Case No. 2600283/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss HL Cunningham

Respondents: (1) A Oasis Cars Limited
(2) Mr I Hussain

FINAL HEARING

Heard at: Nottingham **On:** 11 & 12 March 2019

Before: Employment Judge Camp **Members**: Mrs GK Howdle
Mr C Tansley

Appearances
For the claimant: in person
For the respondent: Mr S Joshi, solicitor

RESERVED JUDGMENT

(1) The first and second respondents sexually harassed the claimant, contrary to section 26 of the Equality Act 2010 ("EQA"), by:-

(a) requiring the claimant to work with someone who she had previously accused of sexual harassment and who had, in fact, sexually harassed her;

(b) giving the claimant a choice between: not working at all for the first respondent; working the shifts she wanted to work and that she habitually worked but with someone who she had previously accused of sexual harassment and who had, in fact, sexually harassed her; working shifts it was inconvenient or impracticable for her to work and/or that she did not want to work.

(2) The first respondent is also liable to the claimant for the following sexual harassment:

(a) a sexual assault by one of its employees / agents on or about 12 December 2017;

(b) breaching the so-called 'trust and confidence term' in the claimant's contract of employment.

(3) The claimant's complaint of sexual harassment, alternatively direct sex discrimination, relating to the second respondent's failure to take any steps in response to the claimant's allegation of sexual assault, fails.

(4) **CASE MANAGEMENT ORDER**: The parties must endeavour to agree remedy between themselves, with the assistance of ACAS if necessary, within 28 days of the date this is sent to them. Within 5 weeks of the date this is sent to them, if the case has not been concluded, the parties must submit their written proposals, agreed if possible, for case management orders for a future remedy hearing, including a realistic time estimate for that remedy hearing and any relevant dates of unavailability.

REASONS

1. The claimant was employed by the first respondent, a taxi business, from around mid-2017 until late January or early February 2018 when, by implication, she resigned. The second respondent is the first respondent's Managing Director. There is a dispute between the parties about how long the claimant's continuous employment with the first respondent was, but that dispute is not relevant to the things we have to decide.

2. This case concerns an allegation that on or around 12 December 2017 the claimant was sexually harassed by the joint owner of the first respondent. We shall refer to him as "Mr R". In summary, she alleges that:

    2.1 she complained to the second respondent about Mr R but the second respondent did nothing;

    2.2 she complained again when she was told that she would be working with Mr R on his return from a period abroad and was told by the second respondent, essentially, that she could either work the shifts that she wanted to work with Mr R or she could work other shifts without him;

    2.3 the respondents were unwilling to contemplate letting her work the shifts that she wanted to work (namely Monday, Tuesday or Wednesday nights) and requiring Mr R to work some other time;

    2.4 ultimately, she resigned because of this.

3. There was a preliminary hearing on 7 June 2018 that, coincidentally, took place in front of Employment Judge Camp. The Employment Judge recalls it being quite a difficult preliminary hearing, because it took place by telephone and neither party was represented. He also recalls thinking at the time that it would have been better had it been an attended hearing. Be that as it may, the Employment Judge produced a list of issues as part of the written record of that preliminary hearing. He made his usual order that if either party felt that the list of issues was inaccurate and/or incomplete in any important way, they were to write to the tribunal saying so. Neither party did.

4. The written record of that preliminary hearing recorded all bar one of the claimant's complaints as being of direct discrimination because of sex, with the

other being a sexual harassment complaint. The complaint identified as being of sexual harassment was about the alleged incident involving Mr R on or around 12 December 2017.

5. That labelling of most of the complaints as direct sex discrimination rather than sexual harassment was the Employment Judge's own labelling. Reading back into the case for the purposes of this final hearing and discussing it with the Members, the Employment Judge and the Members together took the view that the claimant's complaints as detailed in the written record of the preliminary hearing were better characterised as sexual harassment complaints rather than direct discrimination complaints. The Employment Judge has to confess that he cannot now explain why he took a different view following the preliminary hearing.

6. At the start of this final hearing, a number of preliminary matters were discussed. Neither side had complied with most of the case management orders that had been made. There was a distinct possibility that the final hearing would have to be postponed because of a fear that it would be impracticable to proceed given the state of preparedness of the parties.

7. The respondents renewed an application for a postponement which had previously been refused on paper in the run-up to the hearing. We rejected that renewed application. Full reasons were given at the time. Written reasons will not be provided unless requested in writing by one of the parties within 14 days of the sending of this decision to them.

8. Once it had been decided not to postpone the hearing, matters proceeded reasonably satisfactorily from a procedural point of view. All parties produced witness statements; we were able to cope with the documents that we had, albeit there were disclosure failings on both sides. We finally began hearing witnesses at twenty minutes past 3 on day 1 and we got through all of the witnesses and submissions and had time to deliberate by the end of day 2, albeit we did not have time to give the parties a reasoned decision there and then, hence producing this reserved decision.

9. Amongst the things that were discussed alongside procedural matters near the start of the hearing was the fact that although the claimant's claims were, in terms of the factual basis of them, reasonably accurately set in the written record of the preliminary hearing, those claims should be taken to be sexual harassment claims in addition to or instead of direct discrimination claims. The respondents raised no objections to this, nor do we think they could reasonably have done so as it was merely a matter of re-labelling.

10. We refer to the list of issues set out at paragraph (10) of the written record of the preliminary hearing, in particular the factual content of sub-paragraphs (i) a. – e. and (iv):

    a. after the claimant had [allegedly] told the second respondent, on or about 13 December 2017, about being sexually assaulted by a Mr Reza Choudhary – one of the first respondent's drivers, a shareholder in the first respondent, and the second respondent's business partner – on or about 12 December 2017, the second respondent took no steps at all in

response, whether to investigate, to take Mr Choudhary to task, or otherwise;

b. around 29 January 2018, when Mr Choudhary had returned to the UK from a holiday abroad, the second respondent told the claimant by telephone that she was going to have to work with Mr Choudhary on the night shift from 30 to 31 January 2018. This was despite him having previously told her that she would not have to work with him. The previous occasion when he told her she would not have to work with Mr Choudhary was around the start of January, when she raised her concerns about Mr Choudhary with the second respondent at work in front of a group of drivers;

c. also around 29 or 30 January 2018, possibly in the same conversation but possibly in another telephone conversation, the second respondent gave the claimant a choice of working with Mr Choudhary on a Tuesday and Wednesday or working with the second respondent on day shifts on Fridays and Saturdays;

d. the claimant raised a grievance by letter on 31 January 2018. The second respondent responded by a letter dated 5 February 2018. Although it is stated in the second respondent's letter that he was, "more than happy to offer you the same work which you have been doing", the letter concludes, "I have decided to offer you work on Fridays and Saturdays". In light of previous conversations between them, the claimant understood this to be an offer of day time work on Fridays and Saturdays. (The respondents' case is that she was offered nightshifts on Fridays, Saturdays and/or Sundays);

e. the above treatment amounted to a fundamental breach of the claimant's contract of employment, in that it was a course of conduct for which there was no reasonable and proper cause and which was calculated or likely to destroy or seriously to damage the relationship of trust and confidence between the claimant and the first respondent. In response to that breach, the claimant resigned. She did this when she presented her claim form, if not before. She was therefore [she alleges] constructively dismissed.

(iv) Did the respondents engage in conduct as follows: … Mr Choudhary touched the claimant inappropriately on or about 12 December 2017?

11. In relation to the complaints that were deemed to be direct discrimination complaints but which we are now deeming to be harassment complaints, the harassment issues are:

11.1 did the respondent engage in the alleged conduct?

11.2 if so, was it unwanted?

11.3 if so, did it relate to the protected characteristic of sex?

11.4 if so, did it have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is

reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

12. In discussions with the parties during the hearing, it was agreed that we would not deal with any remedy issues at this stage.

13. As to the law, our starting point is the wording of the relevant sections of the Equality Act 2010 ("EQA"), in particular sections 13 and 26. The law is reflected in the wording of the issues in the list of issues.

14. The claimant's case is that she was constructively dismissed. To have been constructively dismissed, she has to have resigned in response to a fundamental breach of her contract of employment by the respondent. She alleges that the first respondent fundamentally breached her contract of employment by breaching the so-called 'trust and confidence term'. An employer breaches that term of the contract of employment if, without reasonable and proper cause, it behaves in a way calculated or likely to destroy or seriously to damage the relationship of trust and confidence between employer and employee.

15. Any breach of the trust and confidence term is fundamental. This highlights how high the threshold that has to be crossed is: "*destroy or seriously damage*" is the wording used. It is not enough, for example, that – without more – the employer acted unreasonably or unfairly.

16. To further emphasise how grave things must be for there to be a breach of the trust and confidence term, or some other fundamental breach of the contract of employment, we note that a fundamental breach is one going to the root of the contract; one that, adopting the wording used in some of the cases, 'evinces an intention not to be bound' by the contract.

17. In terms of case law, our starting point is paragraph 17, part of the speech of Lord Nicholls, of the House of Lords's decision in Nagarajan v London Regional Transport [1999] ICR 877. We also note the contents of paragraphs 9, 10 and 25 of the judgment of Sedley LJ in Anya v University of Oxford [2007] ICR 1451.

18. So far as concerns the burden of proof, a succinct summary of how [the predecessor to] EQA section 136 operates is provided by Elias J [as he then was] in Islington Borough Council v Ladele [2009] ICR 387 EAT at paragraph 40(3), which we adopt. One is looking, first, for "*facts from which the court could decide, in the absence of any other explanation*" that unlawful discrimination has taken place. Although the threshold to cross before the burden of proof is reversed is a relatively low one – "*facts from which the court* could *decide*" – unexplained or inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status[1] and/or incompetence are not, by themselves, such "*facts*"; unlawful discrimination is not to be inferred just from such things – see: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of

[1] i.e. the claimant can point to someone in a similar situation who was treated more favourably and who is different in terms of the particular protected characteristic that is relevant, e.g. is a different age, race, sex etc.

Kent Police v Bowler [2017] UKEAT 0214_16_2203. Further, section 136 involves the tribunal looking for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred. See South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23.

19. Similarly, in relation to a direct discrimination claim, it is for the claimant to prove a prima facie case of less favourable treatment. "*To be treated less favourably necessarily implies some element of comparison: the complainant must have been treated differently to a comparator or comparators, be they actual or hypothetical.*" Harvey on Industrial Relations & Employment Law L[235]. The claimant must show that she was treated less favourably than the respondent treats or would treat others and merely proving, without more, that the respondent treated her badly is insufficient.

20. An alternative approach to examining EQA section 136 ("section 136"), one repeatedly commended by the EAT and Court of Appeal (e.g. in Ladele at paragraph 40(5)) is effectively to ignore the burden of proof altogether and simply to ask: "why was the claimant treated in the manner complained of", i.e. what was the 'reason for the treatment'? We refer to paragraphs 60, 71, 72 and 75 of the decision of the EAT in Laing v Manchester City Council [2006] ICR 1519.

21. Generally, in relation to the burden of proof, we have applied the law as set out in paragraphs 36 to 54 of the decision of the Court of Appeal in Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913.

22. In relation to the harassment claim, we have taken the law to be as set out in Richmond Pharmacology v Dhaliwal [2009] ICR 724, at paragraph 7 to 16.

23. The basic facts are set out immediately below. We will make most of our findings of fact on the things that are in dispute later, when dealing with the issues.

24. The claimant's employment began at the latest in May 2017. She worked as a base controller out of the first respondent's office in Ashfield. She did various shifts on various days, but latterly worked almost exclusively on Monday, Tuesday or Wednesday nights, doing 16 hours or so per week. This was to fit in with her domestic arrangements – she is a single parent of 3 children – which usually prevented her from working at weekends, particularly during the day.

25. The claimant was working a Tuesday to Wednesday night shift on 12 to 13 December 2017. One of the drivers who was working on 12 December 2017 was Mr R. The second respondent has described Mr R as his [business] "*partner*". The claimant alleges that at around 7 pm, Mr R sexually assaulted her by stroking her leg and grabbing her backside.

26. The first respondent's records show that on 12 December 2017, Mr R had a job in Kirkby that ended just after quarter to 7 and another job in Kirkby that arrived by phone in the office at around quarter past 7 and was accepted by Mr R at around twenty past 7.

27. Mr R was out of the country from late December 2017 to 23 January 2018, or thereabouts. The evidence is silent as to whether he and the claimant worked the same shift between 13 December 2017 and him leaving the country; she was not cross-examined about this.

28. The second respondent told the claimant that she would be working in the office with Mr R on his return. There is a dispute between the parties as to when and in what circumstances the claimant first complained about Mr R to the second respondent, but they agree that she did so when the proposal that she work with him on his return was made.

29. The claimant last worked for the first respondent overnight on 24 to 25 January 2018.

30. At some stage in mid to late January 2018, before the weekend of the 27th and the 28th, the claimant went to the police about the alleged sexual assault in December 2017. She was advised to record the telephone calls she made to the second respondent about the situation.

31. The claimant recorded two telephone conversations between her and the second respondent which took place on consecutive days – probably 27 and 28 January 2018. She made transcripts, and these were sent to the respondents many months before the hearing. We listened to the recordings and checked the accuracy of the transcripts in open tribunal. There were no material inaccuracies in them and and we refer to them.

32. The telephone conversations included the following exchanges between the claimant ("C") and the second respondent ("R2"):

    C: … I don't want to work with [Mr R] *because he comes and puts his hands all over you. Why have I got to work with him.*

    R2: Not bothered … I don't want just you in the office …

    C: Why are you making me work with someone I can't work with?

    R2: No, no! I am not. If you want … job work if you don't want job, don't. Up to you …

    C: … you shouldn't be putting people with people I have asked not to be with because of the situation.

    R2: What is the situation? My situation is it is my company. I want my partner to sit at night time and I sit daytime. …

    C: … If I don't want my job then not to come in, but if I do I have to sit next to someone who puts their hands on you and you don't like it?

    R2: Up to you, love, but he is not touching you, yeah? At no point he touched you.

33. On 31 January 2018, the claimant wrote a letter of grievance to the second respondent, which speaks for itself. Around the same time, she telephoned the minicab licensing team at the local council and then, around 1 February 2018, sent them an email, to which we refer and which is, again, self-explanatory.

34. The police investigated in late January and early February 2018. Mr R was interviewed by the police. He was never arrested or charged.

35. On 5 February 2018, the second respondent sent the claimant a letter replying to her grievance. Again, we refer to that letter.

36. The claimant went through early conciliation in a single day, on 5 February 2018. The claim form was presented 2 days later. The last relevant communication between the parties was an exchange of text messages at around 6.30 pm on Saturday, 10 February 2018, as follows:

> *R2: Hi how r u tomorrow 7 to 17 is ok for u ? Pls thxx*
> *C: I took my job on working nights from the start ….. of I can have night back ok this no thank you*

37. Chronologically and logically, the first issue and fact that we need to deal with is: what, if anything, happened between the claimant and Mr R on 12 December 2017?

38. There is a straight conflict of evidence between the claimant and Mr R. In her handwritten statement which she drew up during day one of the hearing, the claimant describes the incident. Mr R's account, which the respondents adopt, is that on that day he did not even see the claimant and never went into the cab office where the claimant was working.

39. It is not, though, simply a case of one person's word against the other. The claimant and Mr R's witness evidence – what they told us orally and in writing – is only part of the picture. Ignoring section 136 for the time being, if all we had to take into account was the claimant's word against that of Mr R and if the burden of proof were wholly and entirely on the claimant, we would probably find this allegation unproven. There was little or nothing to choose between the claimant's and Mr R's 'performance' from the witness table; they both came across reasonably well. On that basis alone, there would be no particular reason to prefer the evidence of the claimant to that of Mr R or vice versa.

40. However, their evidence at tribunal is not the only evidence before us and, indeed, is probably not even the most important part of the evidence before us. In addition, section 136 has an important role to play.

41. We found it useful during our deliberations to list the factors supporting the claimant on this point and the factors supporting the respondent and Mr R.

42. In support of the claimant's case we have, first, her witness evidence. This is where section 136 comes in. People often think of section 136 as only having a role in relation to a direct discrimination claim and in relation to whether the reason for particular treatment was the protected characteristic in question or was something else. But section 136 is not limited in this way. There is no reason in principle why section 136 should not have a role in relation to matters of fact such as, in the present case, whether what the claimant alleges happened actually did happen.

43. There can be no doubt that if the claimant's factual allegations are made out, then the respondents, through Mr R, were guilty of unlawful harassment related to sex under EQA section 26. It seems to us that the claimant's witness evidence is indubitably evidence from which we "*could*" conclude that unlawful

discrimination had taken place. The burden, therefore, shifts to the first respondent. What that means in the present case is that, effectively, it becomes for the first respondent (through Mr R) to satisfy us that Mr R did not sexually harass the claimant as she alleges he did. During submissions, we put it to the respondents' representative that that was the position and although he would not in terms make a concession in that respect, he could not come up with any arguments to the contrary.

44. It seems to us the only way in which the burden of proof would not reverse in circumstances like those we have in the present case would be if the claimant was such an unsatisfactory witness that no credence at all could be given to her allegations, or something like that. Suffice it to say that we did not find the claimant to be an unsatisfactory witness at all, let alone one so unsatisfactory as to be completely unbelievable.

45. Putting section 136 to one side, there is at least one compelling reason for accepting the claimant's evidence. This is the lack of any discernible reason for the claimant to have made the allegations up. We note that the claimant went to the police and to the local licensing authority – the Council. We also note that this is not a case where the claimant could possibly be mistaken as to the substance of what she was alleging had happened. Based on her evidence in her witness statement, there is no scope for misunderstanding or misinterpretation. It seems to us that (unless the claimant is completely deluded, an idea we reject out of hand) either the claimant was sexually harassed or she is deliberately lying.

46. We think that to deliberately lie in making these allegations and to go to the police and the minicab licensing authority with them, the claimant would have to have some particular malice towards the respondents and towards Mr R. In his oral evidence, Mr R accepted that he could think of no reason at all for the claimant to have anything against him. The motive that was put to the claimant in cross-examination was that she had made up these allegations against Mr R because she did not want to be in the office with him because she did not want to be supervised in her work by anyone. That seems to us to be a very implausible explanation for somebody to make up very serious allegations against somebody they have nothing against personally and to take those allegations to the police and other authorities.

47. A number of things have been mentioned during the case by the respondents and on their behalf which, it was submitted, weaken the claimant's case. None of them, taken individually or cumulatively, seemed to us to be a good reason to prefer the respondents' case to the claimant's.

    47.1 In submissions it was pointed out, rightly, that the claimant did have a tendency during her evidence to refer to things that were not relevant. We do not think that this adversely affects her credibility in relation to relevant issues at all.

    47.2 The claimant sought to rely on written statements from a Mr Shibgandi and from a Miss Parkin which were unsigned and which were said by the respondents to be of dubious veracity. Again, we do not think that this adversely affects the credibility of the claimant. If the respondents had

produced either of those two individuals as witnesses and they had given evidence to the effect that they had not given the claimant the statements which she produced and said came from them, that would affect her credibility. But that is not what happened. Instead we were presented with two documents that purported to be statements which, in the absence of the people who the statements came from, we felt unable to give any significant weight to. But the fact that we give little weight to part of the claimant's documentary evidence does not mean that we do or should give little weight to other parts of her evidence.

47.3 The respondents complain that the claimant did not disclose a copy of her statement to the police – her section 9 statement. We know from our own knowledge that the police do not routinely give people copies of their section 9 statements. The claimant is not a particularly sophisticated individual and certainly is not accustomed to court or tribunal proceedings. It is true that the claimant could probably have obtained her section 9 statement from the police had she asked for it. However, the respondents did not ask her to make any such request. Indeed, the respondents did not make any point about her section 9 statement prior to the hearing itself. Had the respondents asked the claimant for a copy of her section 9 statement weeks or months before the hearing and had the claimant then made no efforts to obtain it from the police, there would potentially be a credibility point for the respondents to take. Given the actual circumstances, though, we think there is no proper basis for us to make the finding the respondents would like us to make: one to the effect that the reason the claimant has not produced a copy of her section 9 statement is that it does not support the case that she is now putting forward in the tribunal.

47.4 Potentially a better point the respondents make is in relation to the claimant's alleged vagueness about the dates on which the alleged assault occurred. In submissions, the respondents' case was put forward on the basis both that there was vagueness as to dates and times and that the claimant changed her case as to when the alleged assault happened. It was suggested on the respondents' behalf that when the claimant had first complained about the alleged harassment, she had been vague about the dates. However, the second respondent's own evidence was to the effect that, initially, the claimant had specifically identified 6 December 2017 as the relevant date and had then, around a week later, on or about 31 January 2018, identified 12 December 2017 as the correct date. It seems to us that the real potential credibility issue is not the alleged vagueness as to dates, which is not made out even on the respondents' own evidence, but the alleged change in the dates.

We are not, however, satisfied that the claimant did in fact come up with two dates. The first time the respondents alleged that the claimant had changed the date was in the second respondent's witness statement provided to the tribunal half way through day 1 of this final hearing. It was not, for example, mentioned in the ET3 response form, nor, it appears, at the preliminary hearing in June 2018.

47.5 The respondents rely on the fact that the claimant did not report the alleged assault to the police or to the Council in December 2017 when it happened.

There is no right or wrong way to react to being sexually assaulted. It is not unreasonable, and certainly does not undermine the claimant's credibility, that she did not report the matter at the time.

47.6 The respondents allege that the claimant did not report the alleged assault to them at the time either. In relation to this, we prefer the claimant's evidence that she did report it to the respondents' denials. The first time the respondents suggested that the claimant delayed in reporting it was on 5 February 2018 in the second respondent's reply to the claimant's written grievance of 31 January 2018. During the covertly recorded telephone calls, the second respondent made no mention of the fact that the claimant was supposedly late in reporting the matter to him. In fact, based on the way the second respondent reacted during the calls to the allegations that the claimant was making – in a dismissive way, essentially ignoring the claimant's concerns completely – it is eminently possible that the claimant did report the matter to him and that, unfortunately, he ignored it and forgot about it. That is much more likely than that the claimant is deliberately lying or misremembering having told him in December 2017.

47.7 The respondents also rely on the absence of contemporaneous documentary evidence corroborating the claimant's case. Similarly, this does not adversely affect the claimant's credibility so far as we are concerned. We think this submission amounts to another one along the lines that there is a right way to react to being assaulted, which is to make a loud and public complaint. No doubt some people in the claimant's position would have sent messages to their friends saying something about the assault and/or posted something on social media. Some people would not. The fact that the claimant told us she could not remember having done so gives us no concerns at all in relation to her credibility.

47.8 A factor in the respondents' favour, which we have already mentioned in passing, is Mr R's performance in the witness box. The only thing in his evidence that gave us a cause for concern was his insistence that at 7 o'clock in the evening, in Ashfield, it takes 10 to 15 minutes to drive 2.3 miles. We think average driving speeds significantly higher than 10 miles an hour or so are likely at that time of day.

47.9 The respondents seek to suggest to us that, given the jobs Mr R was doing before and after 7 o'clock and the times of those jobs and the distance between those jobs, it is highly improbable that Mr R would have had time to come back to the office and sexually harass the claimant as she alleges he did. It is right that the window of opportunity, as it were, was relatively small. However, it was not implausibly so. What the respondents' records show to us is that Mr R finished one job at between a quarter and ten to 7. It would have taken him, perhaps, 10 minutes to get back to the office. On the evidence, he would not have known that he was going to be doing another job at 20 minutes past 7, let alone where that job was going to be. So it would be perfectly natural for him to return to the office after he completed his pre-7 o'clock job. The claimant's description of what occurred is a brief chat, followed by an assault, followed by Mr R leaving after she

shouted at him. That fits comfortably within the timeline that we have, giving him more than enough time to get to his next job.

48. In conclusion, weighing up the factors supporting the claimant versus those supporting the respondents we would come down in the claimant's favour on the balance of probabilities even in the absence of section 136. When we factor that in, the position becomes even clearer.

49. We have made our decision on the basis of the evidence we have. The respondents allege that they had had in their possession evidence which exonerated Mr R completely, but that that evidence unfortunately no longer exists. The respondents have a system for tracking the whereabouts of the taxis using GPS. The respondents' evidence was that that GPS evidence proved Mr R's taxi never returned to the office on the evening in question.

50. Not being able to see that evidence for ourselves, we do not accept what the respondents tell us about it. We are particularly unwilling to accept the respondents' evidence about it in circumstances where, according to the respondents themselves, the GPS evidence was in the respondents' possession at the time the claim was issued; and, indeed, continued to be in their possession up to May 2018. The respondents submitted an ET3 Response on 12 April 2018. It is, frankly, baffling that the first respondent, if it had evidence that definitively cleared Mr R of wrongdoing, did not preserve that evidence and rely on it at every stage of these proceedings. Instead, it just allowed the evidence to be wiped.

51. Mr R is not responsible for the state of the respondents' evidence. He may feel hard done by if it is true that there was evidence that exonerated him which the respondents had in their possession that they allowed be destroyed (something which, for the avoidance of doubt, we do not accept). If we have made a finding against Mr R that we would not have made had this alleged GPS evidence been preserved, the blame for this should be laid entirely at the respondents' door.

52. Accordingly, the claimant's allegation that Mr R touched her inappropriately on or about 12 December 2017 and that this constituted harassment related to sex is made out.

53. We turn to allegations a. to e. which, as mentioned above, we take to be primarily allegations of sexual harassment or, alternatively, direct sex discrimination.

54. Allegation a. concerns the second respondent's failure to investigate or take Mr R to task, or otherwise to respond to the claimant's allegation. We have already found that the claimant did raise the allegation with the second respondent and, on the evidence, there is no suggestion that the respondents did anything in response until their hands were forced by the claimant in January 2018. However, for us, neither the allegation of direct sex discrimination nor that of harassment is made out. We are not satisfied that the second respondent's lack of response related to sex or was because of sex. Further, there was no less favourable treatment. We are not satisfied that the second respondent would have treated any other complaint by a relevant comparator any differently. Also, we do not think that this initial failure to investigate or otherwise respond had the necessary purpose or effect pursuant to EQA section 26(1)(b).

55. Allegations b., c., and d. belong together. Allegation b. relates to the second respondent telling the claimant that she should work with Mr R, notwithstanding her concerns about him. Allegation c. is, essentially, giving the claimant the choice between working the hours that she wanted to but with Mr R or working hours she did not want without him. Allegation d. relates to the respondents' response to the claimant's letter of grievance of 31 January 2018. The claimant's case is that the respondents 'doubled down' on what they had previously done by repeating an offer which amounted to requiring the claimant to choose between working with Mr R and working on days and at times that the claimant did not want and could not do.

56. Although the true dates on which things occurred are slightly different from those set out in the list of issues and although the days when the claimant wanted to work are also slightly different from what appears in the list of issues, it is factually correct to say that the claimant was given a choice between working with Mr R on her preferred days and working without him on days that she did not usually work and which were inconvenient and/or impossible for her to work. Those facts are established beyond any doubt by the transcripts of the telephone calls.

57. In relation, specifically, to complaint d., it appears from the transcript of the second conversation that the second respondent did mention work at weekends – on Sunday nights – or, at least, that the second respondent at some stage suggested that work on Sunday nights might be available to the claimant. The only contemporaneous evidence we have of the specific shifts being offered to the claimant after 31 January 2018 is a text message of 10 February 2018 which contains an offer of working from 7 am to 5 pm on a Sunday. This complaint is not, however, so much about offers of dayshifts versus nightshifts. Instead, as with complaints b. and c., it centres on the claimant only being permitted to work her preferred shifts if she was willing to work them with Mr R. This allegation is made out as a matter of fact to that extent at least.

58. The second respondent's behaviour during the telephone calls was really rather extraordinary. Insisting that somebody, if they wished to work their normal and preferred shifts, must work with someone against whom they had made an allegation of sexual harassment, was unwanted conduct relating to the protected characteristic of sex. It had, in the particular circumstances of this case, the necessary purpose and effect.

59. If there is any issue in relation to these complaints where there is room for doubt as to whether there was harassment, it is in relation to whether this conduct related to sex. We do not think it is necessary for us to do so but, if it is, we rely on section 136 to shift the burden to the respondent. It seems to us that the bare facts already outlined – saying to the claimant something to the effect that she was expected to work with someone who she had accused of harassing her – could satisfy us that unlawful discrimination in the form of sexual harassment had taken place, including that the unwanted conduct in question related to sex. The respondents have done nothing to prove that in no sense whatsoever was this unwanted conduct related to sex and, generally, discriminatory.

60. Allegation e. is put as a single allegation but is in fact, upon analysis, two allegations. The first allegation is that the respondents' treatment of the claimant amounted to a fundamental breach of her contract of employment, namely a breach of the trust and confidence term. The second allegation is that the claimant resigned in response to that breach, that she was therefore constructively dismissed, and that that constructive dismissal was 'tainted' by discrimination and was therefore a discriminatory dismissal.

61. The allegation of a breach of the trust and confidence term is plainly made out. The course of conduct constituting that breach consists of the harassment itself, the second respondent's initial ignoring of the claimant's complaints, and then, both in response to the claimant's further complaints and in response to the claimant's grievance, requiring the claimant to choose between working shifts that she wanted to but with Mr R and working shifts that she did not want to and/or could not do without Mr R. That was, it seems to us, conduct that was likely to destroy or seriously damage the relationship of trust and confidence and there was no reasonable and proper cause for it.

62. In relation to 'reasonable and proper cause', we note that, according to Mr R's own oral evidence, he was not even asked by the second respondent whether he would be willing to work different shifts. The second respondent's sole concern seems to have been his own convenience.

63. The things making up the breach of the trust and confidence term were unwanted conduct and most of them related, to a significant extent, to the protected characteristic of sex. Taken together, they certainly had the requisite effect to constitute harassment.

64. The second part of complaint e. is, as just mentioned, the allegation of constructive dismissal. We have identified a significant potential problem for any constructive dismissal complaint, namely that, arguably, the claimant's employment did not terminate before she launched her claim. This is not an issue that was raised by the parties during the hearing and is one that we have raised for ourselves during our deliberations.

65. In both the claim and response forms, the parties agreed that employment terminated on 29 January 2018, but that is factually incorrect on any view. The claimant does not resign in any of the conversations that have been transcribed. Her letter of grievance does not contain a resignation. Even as late as 10 February 2018, in her reply to the second respondent's text message asking her to work 7 am until 5 pm the following day, the claimant does not suggest that she had resigned or hint that she might have done so.

66. We think the earliest date the claimant's employment could have terminated was when the claim form was lodged. Assuming that is so, the claimant could not have brought a claim of unfair dismissal under the Employment Rights Act 1996 even if she had worked for the first respondent for more than 2 years. A more difficult question is whether it stops a complaint of direct discrimination or harassment relying on the constructive dismissal as the unwanted conduct or less favourable treatment under the EQA. Whether it does prevent such a claim being made and whether the claimant's only valid complaint within e. is the complaint about the breach of the trust and confidence term would, we think, be

relevant only to remedy if it is relevant at all. As it is not a matter on which either party gave submissions and as it was agreed with the parties that no issues of remedy would be dealt with at this stage, we propose to deal with it at the remedy hearing, if there has to be one (i.e. if the parties cannot agree remedy between themselves).

67. In conclusion, all of the claimant's complaints succeed except for complaint (i) a. and, potentially, the part of complaint (i) e. to the effect that the claimant was discriminated against by being constructively dismissed.

68. Finally, the Employment Judge would like to apologise to the parties for the time it has taken to produce this written decision. The delay was not the fault of the Members or of the tribunal administration but was entirely down to the Employment Judge and his other work commitments.

Employment Judge Camp

03 June 2019

Sent to the parties on:

……

For the Tribunal:

…..……..