EMPLOYMENT TRIBUNALS

Claimant:	**Chloe Thomas**	
Respondent:	**Waldron Commercials Limited**	
Heard at:	**Cardiff**	**On: 27 and 30 September 2019**
Before:	**Employment Judge R Brace** **Members:** **Mrs P Palmer** **Mr W Davies**	

Representation:
Claimant: Ms J Richards (Solicitor)
Respondent: Lucy Williams (Employment and HR representative)

JUDGMENT

The claimant's claim under s.26(2) Equality Act 2010 ("EqA 2010") in respect of the unwanted conduct on 8 December 2018 is well founded.

The claimant's remaining claims under s.13 EqA 2010, s.26(1) EqA 2010, s.26(2) EqA 2010, s.26(3) EqA 2010 and/or s. 27 EqA 2010 are not well-founded and are dismissed.

RESERVED REASONS

Preliminary matters

Claims and Issues

1. At the commencement of the hearing, a number of case management decisions needed to be made, largely due to the significant change in the pleaded case of the claimant from the original ET1 filed, and the amended ET1 filed following the case management preliminary hearing which had taken place on 2 July 2019. There was, as a result, a lack of clarity in the type of claim that the claimant was seeking to bring, and in turn, lack of clarity on the issues that we were being asked to determine.

2. The morning of the first day of the hearing was spent resolving these issues as well as dealing with several applications made by both parties as addressed further.

3. The claims, and issues for determination, had initially been discussed at the case management hearing on 2 July 2019 where the claimant had been represented. At that stage, the original ET1 was brief and it was unclear what type of sex discrimination claim

under the Equality Act 2010 ("EqA") was being claimed by the claimant. Since the issue of proceedings, but before the preliminary hearing, the claimant had also resigned from employment and her representative had indicated that she wished to amend her claim to include any claim arising out of that resignation.

4. As reflected in the case management order, from the face of the ET1 form originally filed, the claims were as follows:

    a) s.26 EqA 2010 - harassment related to sex and / or of a sexual nature in relation to the conduct of the claimant's line manager at the Christmas party on 8 December 2018 in following the claimant around, pinching her bottom, making suggestive remarks and asking the claimant to sit on his shoulders;

    b) s.27 EqA 2010 – victimisation- following submission of a grievance on 5 March 2018 ('protected act') the claimant was subjected to a number of detriments including:
        i. suggestions that the claimant would prefer to work in an office environment or different type of apprenticeship;
        ii. was disciplined;
        iii. was spoken to about her clothing.

5. At the preliminary hearing the claimant was directed to file an amended ET1 to include:

    a) particulars of any claim arising out of the claimant's resignation on 7 May 2019; and

    b) in respect of each act and omission complained of, to provide particulars of:

        i. the date that it took place;
        ii. brief details of what happened, identifying the person or persons concerned;
        iii. whether it was alleged to be victimisation or harassment.

6. No leave was given to make any further amendments. The respondent was also ordered to file any amended response that it sought to rely on following that amended ET1.

7. The amended ET1 submitted as a result of that order, and now relied upon by the claimant ("Amended ET1") at this hearing was however significantly altered from the original ET1 submitted, adding in additional facts and stating in general terms that the claimant now wished to bring claims for:

    a) Direct Discrimination;
    b) Indirect Discrimination;
    c) Harassment related to sex;
    d) Victimisation;
    e) Personal Injury; and
    f) Unfair Dismissal as a result of the claimant's resignation on 7 May 2019.

8. The respondents submitted an Amended ET3 dealing with the issues raised in the Amended ET3. The statutory defence under s.109(1) and (3) Equality Act 2010 was not pleaded or relied upon and the respondents did not seek to argue that the events

of 8 December 2018 were not done 'in the course of employment'. These were therefore not issues for us to determine.

9. At the outset of the hearing it was conceded by Mrs Richards, representative for the claimant, that:

   a) despite seeking to claim unfair dismissal in the Amended ET1, the claimant had insufficient continuity of employment to bring an ordinary claim of unfair dismissal claim under s.98 Employment Rights Act 1996;

   b) despite seeking to claim indirect discrimination, the claimant was not seeking to bring a claim for indirect discrimination;

10. She also confirmed that in respect of all conduct complained of, the claimant was also seeking to rely on s.13 EqA 2010 (direct discrimination) with the male apprentices as her comparators (para 7 Amended ET1).

11. Whilst the Amended ET1 set out further particulars of the conduct relied upon, it did not identify, despite the case management order, in respect of each act complained of whether it was alleged to be harassment under s.26(1), s.26(2) or s.26(3) EqA 2010 or victimisation. We therefore took the opportunity to address this at the outset of the hearing.

12. The claimant's representative confirmed that in addition to relying on s.13 EqA 2010, in respect of the harassment claims, the conduct complained of was as follows:

   a) Conduct of Gareth Clarke on 8 December 2018 (Para 6.5, 6.6 and 7.1 Amended ET1)

      s.26(1) or s.26(2) EqA 2010

   b) Conduct of Gareth Clarke whereby he:

      i. would work overtime so that he could be on the same shift as the claimant and made to do menial tasks / forced into situations where the claimant would be alone with him (para 6.10 and 7.4 Amended ET1)
      ii. gave the claimant less time to complete tasks (para 6.10.1 Amended ET1);

      iii. prevented the claimant from going to lunch (para 6.10.2 Amended ET1);
      iv. made comments about the claimant's wet clothes and made comments of a sexual nature (para 6.10.3 and para 7.3 Amended ET1);

      v. commented on the appropriateness of the claimant's clothing (para 6.10.4 Amended ET1);

      vi. removed the claimant from jobs her shift manager had given her (para 6.10.5 Amended ET1);

      vii. made the claimant feel isolated (para 6.10.6 and 7.5 Amended ET1);

      viii. complained about the claimant's boyfriend (para 6.10.7 Amended ET1);

      ix. complained about the claimant to management (para 6.10.8 Amended ET1).

x. mocked the claimant's condition and called her 'baldy' (para 6.15 Amended ET3)

s.26(1), 26(2) or s.26(3) EqA 2010

c) Conduct of the respondent whereby they:

i. in January 2019 failed to deal with the complaints the claimant made about Gareth Clarke and told the claimant to 'get used to it'
Para 6.11 and 7.7 Amended ET1;

ii. told the claimant to 'smile more' and to watch her language
Para 6.12, 6.13 and 7.6 Amended ET1

iii. Told the claimant go and 'make up with everyone'
Para 6.17 Amended ET1

iv. told that she would have to get used to Gareth Clarke's style of behaviour as he was ex-army
Para 7.7 Amended ET1

v. Dismissed the claimant constructively
Para 6.21 Amended ET1

s.26(1) or 26(3) EqA 2010

13. Albeit the unwanted conduct relied on by the claimant had expanded factually from the original ET1, the issues with regard to the s.26(1) EqA 2010 harassment claims were set out in the order from the preliminary hearing.

14. The claims under s.26(3) EqA 2010 were not set out in the Issues section of the case management order as this had not been addressed at that stage.

15. An application to amend the victimisation claim in paragraph 11.2 from victimisation to harassment, meant that the only victimisation claims pleaded was that set out in paragraph 11.1 i.e. that she was suspended the day after making her grievance. There was an application to include a further victimisation claim as set out below.

16. The issues arising from any victimisation claim were set out in the case management order.

17. There were no updated agreed List of issues however and none that had been formulated by the parties following the Amended ET1 and ET3 being submitted by the parties.

Application to amend ET1

18. An application was made by the claimant to further amend the claim to:

a) relabel the claim set out in paragraph 11.2 of the Amended ET1 (suspension and handling of the claimant's grievance) from one of victimisation under s.27 Equality Act 2010 ("EqA 2010") to one of harassment under section 26(1) EqA 2010 or, in the alternative, s.26 (3) EqA 2010;

b) include a new victimisation claim, that the claimant had been subjected to a detriment by reason of the comments made about the claimant set out in the respondent's Amended ET3 filed on 4 July 2019 that the claimant was '*flirtatious, volatile and aggressive'* and '*a troublemaker, manipulative and flirtatious*';

19. The respondent's representative confirmed that she had no objections to allowing a relabelling of the claim at paragraph 11.2 of the Amended ET3 (suspension and handling of the claimant's grievance) from one of s.27 EqA 2010 (victimisation) to one of s.26(1) and s.26(3) EqA 2010 (harassment).

20. This amendment was therefore allowed.

21. In relation to the additional victimisation claim, i.e. that relating to the Amended ET3 comments, we had regard to Rule 29 of the Employment Tribunal Rules of Procedure (the "Rules",) which gives a broad discretion to make case management orders, including acceptance of amendments to claims and that this discretion should be exercised in according with the overriding objective in Rule 2 of the Rules.

22. We also considered the Presidential Guidance on amendments, and the guidance set out in Selkent Bus Co Ltd v Moore [1996] ICR 836 with the key principle being that when considering the exercise of discretion to allow an amendment, we are to have regard to all the circumstances of the case and in particular undertake a balancing exercise of any injustice and hardship caused to the parties.

23. We considered the nature of the amendment, applicability of time limits and the timing and manner of application and took into account the following:

a) The amendment was very closely connected with the claim and was, in essence, part of the defence of the claim made by the respondents;

b) The claim was still within time;

c) The application was extremely late. In no way could the application be said to have been made reasonably promptly. Indeed, the claimant's representative gave no explanation for her failure to make such an application despite having raised concerns regarding the contents of the respondent's pleadings with them since receipt of the Amended ET3 in July 2019.

24. Taking into account, however, the 'detriment' claimed formed part of the defence being put forward by the respondent and had been dealt with in the respondent's witness statements as a result, it was difficult to see what hardship could be caused to the respondent. We concluded that injustice to the claimant in not allowing the amendment persuaded us to allow the claimant's amendments.

Additional Documents

25. Applications were made by both the claimant and the respondent to include additional documents to the agreed bundle of documents before the tribunal (the "Bundle").

26. With regard to the additional documents that had been sought to be included by the respondent and were included in the Bundle at pages 344 – 348, these were handwritten statements from various employees of the respondent taken

contemporaneously and dating back to February and March 2019. These documents related to matters which had been referred to at paragraph 24 of the claimant's witness statement, which had not been pleaded and was not considered by the respondent to be relevant to the claim.

27. The claimant's representative confirmed that the claimant was not relying on matters referred to in paragraph 24 of the claimant's witness statement, as part of her discrimination claim.

28. With regard to the additional documents that the claimant also sought to adduce, these were copies of correspondence between the parties and this was provided by way of separate supplementary bundle.

29. In accordance with the overriding objective, and on the basis that neither party had any strong objections, leave was given for all documents to be included, but we confirmed that we would not be making any findings of fact in relation to paragraph 24 of the claimant's witness statement, as it was agreed by the claimant's representative that this was not being relied upon to support her claims.

Application to Strike Out

30. An application was made by the claimant to strike out part of the ET3 response, whereby the respondent denied the conduct of Gareth Clarke on 8 December 2018 was sexual harassment, on the basis that it had no reasonable prospects of success and/or was vexatious.

31. We were not minded to strike-out part of the response relating to the allegation of sexual harassment on 8 December 2019.

32. We considered that the drafting of the grievance outcome letter required clarification that could only be obtained on cross-examination of the author of that letter, Mr Luke Hillyard.

33. Whilst it was not disputed by the respondent that Gareth Clarke did touch the claimant's bottom whilst out on a Christmas works event, and that Mr Hillyard, who had conducted the grievance investigation, had accepted that this had happened, it was not clear to us without hearing the evidence that the respondent had no prospects of success or indeed that any of the criteria for a strike out under rule 37 of the Rules had been met as we needed to consider evidence on the purpose or the effect of the conduct.

<u>The evidence</u>

34. The Tribunal heard evidence from the claimant, Chloe Smith and her mother, Jayne Smith, and from the respondent witnesses as follows:

a) Daniel Gould, Apprentice;
b) Alex Redmond, Supervisor;
c) Sean Rosser, Technician;
d) Alistair Waldron, Managing Director;
e) Katie Waldron, shareholder and Office and Accounts Manager; and
f) Luke Hillyard, Employment Law/HR Advisor Key Safety Solutions Limited

35. All witnesses relied upon witness statements (the claimant also relied upon a supplementary witness statement) which were taken as read, and all witnesses were then subject to cross-examination, the Tribunal's questions and re-examination.

36. The Tribunal was also provided with a signed statement from the respondents, from Lyndon Guppy, Technician. Mr Guppy did not attend the hearing and therefore the claimant's representative was not in a position to cross-examine him on his evidence.

37. The Tribunal was referred selectively to the Bundle of relevant documentary evidence by way of reference to page numbers in the bundle by reference to the page numbers within the respondent's witness statements. The claimant's representative had failed to do this despite the case management order of 2 July 2019 (order 5.3).

Assessment of the evidence

38. The tribunal was satisfied that all respondent witnesses gave their evidence honestly and to the best of their knowledge and belief. We found them to be consistent and compelling and their accounts plausible

39. In contrast, the Tribunal found the claimant on cross examination in some places to be contradictory to the evidence that she had given in her witness statement and her oral evidence contradictory to her pleaded case.

40. The tribunal preferred the evidence of the respondents where there were matters of dispute or contest for this reason.

Findings of Facts

41. The respondent is a garage with a workshop employing around 16 members of staff specialising in service, repair and maintenance of heavy goods vehicles ("HGV"). The managing director of the company is Alistair Waldron and his wife, Katie Waldon, is the respondent's Office and Accounts Manager.

42. The claimant was 21 years' old when she started as a Trainee Mechanic on 1 February 2018. She commenced as an Apprentice HGV and LCV Mechanic from September 2018. The claimant developed a close friendship with one colleague in particular, Lyndon Guppy, getting work guidance and general support from him.

43. Whilst the claimant's employment started off positively, both Alistair and Katie Waldron had cause to regularly speak to the claimant regarding her challenging and negative attitude towards work, not focussing on her work, not following instructions and gossiping. She was also asked to moderate her language, which was considered to be more extreme than others in the workshop, a place where bad language was to a degree common-place and tolerated. Other witnesses also confirmed that whilst bad language was used in the garage, the claimant directed her language at individuals and had used the word 'cunt', which employees and the respondent found particularly offensive and on a level above the normal workplace bad language.

44. Katie Waldron had a particular concern as customers and work experience school children could overhear such language and had cause to speak to the claimant to understand whether she was happy in the workplace as she did not appear to be settling in. She offered to work with the claimant's college to source the claimant another placement if that was what the claimant wanted. The claimant declined, wanting to stay with the respondent.

45. Katie Waldron also spoke to staff on a weekly basis with one of the objects to encourage a more pleasant atmosphere and good customer service, telling staff that they would *'get more with a smile than a frown'*. This was not directed at the claimant specifically and was said to the staff as a whole group.

46. At the end of October 2018, Gareth Clarke started work at the respondent as an HGV and Light Commercial Vehicle technician and, from 20 November 2018. He was just a few years older than the claimant and took on the role of shift supervisor. The role of supervisor involved allocating jobs to technicians on a particular shift. Alex Redmond was also employed by the respondent as a shift Supervisor and had been in that role for the previous two years, having joined the respondent 7 years' ago.

47. Mr Clarke became the claimant's supervisor and initially she felt reassured working with him as her new supervisor. The claimant believed that her previous supervisor used to pick on her and she held a belief that he had an issue with working with females. Gareth Clarke was only a few years older than the claimant and, because she had expressed concerns to him regarding her previous supervisor and her belief that he did not like working with females, she felt reassured when Mr Clarke told her that he was used to working with females having been in the armed forces. This was a comment made by Mr Clarke and not Katie Waldron.

48. There was some, albeit limited, evidence from both Alex Redmund (in the grievance investigation) and Sean Rosser, in his written statement that the claimant was initially flirtatious with Gareth Clarke. Neither were challenged on this evidence by the claimant's representative and we accepted that this was the impression that the claimant had given to others when Mr Clarke had initially started work.

7 December 2019

49. Whilst there was no evidence that the working relationship between Gareth Clarke and the claimant was anything than good in his first few weeks of his employment, by the beginning of December, as her supervisor both Gareth Clarke and Alex Redmund had cause to speak to the claimant regarding her general negative and disruptive behaviour, non-completion of her allocated tasks and aggressive and abusive attitude. Other male apprentices did not cause the same level of concern although they too were spoken to regarding performance and any conduct concerns.

50. A meeting was held on 7 December 2019 by Gareth Clarke and Alex Redmond with the claimant to discuss these concerns.

51. Steph Johns, administrator for the respondent, also attended to take a contemporaneous note at Alistair Waldron's request, as he had concern that the claimant would be aggressive and challenging. claimant reacted badly to the feedback from Mr Clarke and Mr Redmund. The claimant was rude and surly. This was reflected in the contemporaneous note, and also confirmed by Alex Redmund, in his witness statement and on cross examination.

52. We accepted that evidence and found that by this point in time:

    a) the respondent held concerns regarding the claimant's general work performance and her general attitude;

    b) had been spoken to about this by Katie and Alistair Waldron, Alex Redmund and Gareth Clarke; and

c) the claimant was considered by the respondent to be aggressive and challenging and conducted herself in this manner at that meeting.

8 December 2018

53. The following day the respondent's workforce, including Katie and Alastair Waldron, attended the staff Christmas event in Cardiff, where there was a meal followed by a team building event held at the Escape Rooms. The tribunal panel confirmed to the parties' representatives that they understood the concept of Escape Rooms whereby a team of players discover clues, solve puzzles, and accomplish tasks in one or more rooms with the goal being to escape from the site of the game and no evidence was required on this.

54. The staff were split into teams and, despite the claimant's belief that Gareth Clarke suggested that they group by shifts, the team split was determined by Alastair Waldron. The claimant was put in a team with the rest of the day shift, including Gareth Clarke. Whilst she was the only female in that team, this was to be expected as she was the only female working that shift. Another female was placed in a separate team where she too was the only female in that team, being the only female working that shift. A third team, comprising office staff and Katie Waldron contained a number of women reflective of the gender split in that administration team.

55. In her witness statement the claimant stated:

a) that it had been Gareth Clarke who had suggested that they group by shift for the Escape Rooms as he was on her shift, and this meant that she would have to be with all the male staff;

b) that two other female workers, a 'Rachel' and a 'Monica', had been grouped with the female office staff.

56. On cross-examination however the claimant:

a) accepted that she had been mistaken about the team splits, and that it had been Alex Waldron who had split the Escape Room groups into the shifts in which they worked, not Gareth Clarke;

b) accepted that she that she had also been mistaken about Rachel; that Rachel too had been on the other workshop shift team and that she too had been the only female in that team.

57. Despite the claimant indicating in her ET1, Amended ET1 and in her written statement, that she felt embarrassed and uncomfortable when in the Escape Rooms she had been physically picked up by Gareth Clarke to try to retrieve an item affixed to the ceiling, on cross examination she accepted that this physical contact was part of the exercise and this was not an issue she was now relying on. The claimant's representative also confirmed nothing in the behaviour of Gareth Clarke within the Escape Room event formed part of the claimant's allegation of harassment despite it being pleaded in the original ET1.

58. The evening progressed and alcohol was consumed through-out the night by both the claimant and Gareth Clarke. The event moved through a number of pubs within the city centre, before ending up in a cocktail bar with Gareth Clarke being very drunk by this stage. Whilst on the dancefloor, dancing with two other colleagues, Gareth

Clarke came up behind the claimant and slapped her bottom. He touched her on the bottom, with a slap or a pinch, a further twice. The claimant challenged Mr Clarke about his conduct and told him to 'Fuck off'.

59. A fellow apprentice 'Ross' (whom we did not hear evidence from,) confirmed as part of the grievance investigation, that he had witnessed Gareth Clarke slap the claimant's bottom three times. The claimant also told Lyndon Guppy about the incident. The claimant was upset and contacted her boyfriend. He collected her and took her home.

Weeks following 8 December 2018

60. On her return to work the following week, the claimant's negative behaviour in work continued and notes were prepared by Alex Redmund regarding the claimant's disruptive behaviour and attitude towards both Alex Redmund and Gareth Clarke.

61. The claimant did not talk about Gareth Clarke's behaviour on the night of the Christmas party to other members of staff, but Gareth Clarke did apologise to the claimant a few days later and told her that he could not recollect the incident. The claimant made no complaint to the management of the respondent. She held a belief only that management knew of the fact that Gareth Clarke had in the club pinched her bottom because, following the Christmas break, she was placed on another shift to that was supervised by Gareth Clarke.

62. From the evidence from the claimant, that only 'Ross' witnessed the behaviour and that she only told Lyndon Guppy, and from the evidence contained in the grievance investigation notes, we found that very few employees knew or appeared to know that Gareth Clarke had touched the claimant that night. The claimant only 'thought' that others knew and 'assumed' that they did. Despite the claimant's beliefs and assumptions, we found that management did not know about the incident at the time nor indeed in the following weeks and months. Management were not aware until the claimant submitted her grievance following her suspension on 5 April 2019.

63. On 3 January 2019, after the Christmas break, shifts were changed in the workshop which resulted in the claimant no longer working directly on the same shifts as Gareth Clarke. The claimant was happy with the change.

64. Whilst the claimant had a belief that this was because of Gareth Clarke's conduct towards her on 8 December 2018, we found that this was not the case. We accepted the evidence from Alistair Waldron, that this decision was made by him as a result of upturn in work, which had resulted in the engagement of two new experienced qualified technicians with different skill sets, and a resultant need to redistribute the skill sets amongst the shifts and not as a result of Gareth Clarke's conduct on 8 December 2018. He also held a concern regarding the claimant's relationship with Lyndon Guppy, which Mr Waldron considered disruptive, and he wished to separate the two.

65. It was the claimant's belief that Gareth Clarke then started to work overtime to watch her and to pick on her.

66. A summary of working hours was provided for Gareth Clarke which demonstrated a consistent pattern of overtime work for him. There was also overlap of shifts by some 3.5 hours, whereby one shift commenced at 8.00am and ended at 5.00pm, and the afternoon shift commenced at 1.30pm and finished at 10.00pm, such that Gareth Clarke would work with the claimant even if they were not on the same shift.

67. In addition, in the early part of January 2019, Alex Redmund broke a bone in his foot. As a result, Mr Clarke agreed to work double shifts to cover, whilst Alex Redmund was confined to office work as a result of his injury. This led to an increase in working hours for Gareth Clarke.

68. We were provided with a copy of the summary of overtime for Gareth Clarke, which demonstrated that he had worked a fairly continuous pattern of overtime since the commencement of his employment, with a slight increase in the month of January 2019 correlating with Alex Redmund's injury.

69. Despite the claimant's belief, there was no evidence to suggest that Gareth Clarke had orchestrated this pattern of work to be with her. We accepted the documentary evidence, and the verbal evidence from Alex Redmund and Katie Waldron, and found that the increase in overtime from Gareth Clarke after Christmas was as a result of Alex Redmund's foot injury, and not by reason of any effort of Gareth Clarke to be with the claimant.

70. Text messages disclosed, and included as part of the Bundle, reflected that whilst the claimant did contemporaneously comment and engage with Lyndon Guppy regarding the amount of hours worked by Mr Clarke, no comment was made by the claimant in those private messages, that she felt that this was done by Mr Clarke in order to spend more time with her. Rather, comments from the claimant and Mr Guppy related to amounts earned by Mr Clarke only and generally negative comments from them both regarding Gareth Clarke. These views were also communicated more widely by both the claimant and Mr Guppy to other staff with colleagues forming a view that both the claimant and Lyndon Guppy disliked Gareth Clarke.

71. With regard to her allegation that Gareth Clarke had called her 'baldy' when she showed him her hair loss, the claimant confirmed on cross examination that the claimant had taken the comments as a joke and that she felt that Gareth Clarke was being nice to her. She accepted it as such.

72. In her witness statement and in her Amended ET1, the claimant made a general allegation that Gareth Clarke made comments about the her wet clothes and that he made other sexually suggestive remarks to her.

73. Beyond telling the claimant that he would '*sort that out for her'*, when her overalls got wet, there was no other narrative within the claimant's witness statement, nor indeed oral evidence given by the claimant on cross-examination, that comments had been made by Gareth Clarke to her that had sexual connotation. The claimant simply stated again that she made the allegation based on her belief; that she 'felt' that his comments were of a sexual nature. This allegation was not present in her written Grievance.

74. We heard evidence from Alistair Waldron that the claimant was offered a pair of dry overalls by Gareth Clarke from his vehicle when the claimant's old overalls were wet and that she had worn them tied around her waist which was a health and safety hazard in the workshop.

75. Taking into account:

    a) the lack of any evidence from the claimant regarding any sexually suggestive remarks at any other time from Gareth Clarke;

b) in relation to the comment regarding the wet overalls, the basis of the allegations stemmed from the claimant's feeling only; and
c) the context explained by Mr Waldron,

we found that no sexually suggestive remarks had been made to the claimant by Mr Clarke at any time.

76. The evidence from the claimant in cross examination was that she 'felt' that Alex Redmond and Gareth Clarke were targeting her.

77. There was little or no evidence from the claimant to support the allegations raised in her Amended ET3 that Gareth Clarke:

a) made her do menial tasks;
b) forced her into situations where she would be alone with him;
c) prevented her from going to lunch;
d) gave the claimant less time to complete tasks;
e) removed the claimant from jobs her shift manager had given her;
f) made her feel isolated;
g) complained about her boyfriend.

78. We accepted the evidence from Alex Redmund and Alistair and Katie Waldron that following 8 December 2018 the claimant continued to be disruptive and that the claimant was spoken to again regarding her attitude, language and her aggressive and disruptive behaviour. There was no evidence that other apprentices were considered to be disruptive or aggressive. The claimant accepted that Mr Clarke would shout at all of the apprentices.

79. We also found that the claimant had been spoken to about taking smoking and taking excessive drink breaks during her shift by staff including Alistair Waldron as well as Gareth Clarke.

80. We did not find that Gareth Clarke conducted himself in the manner alleged by the claimant.

Claimant advised Katie Waldron of GC conduct / Failure to deal with the complaints the claimant made about Gareth Clarke

81. In her witness statement (para 26,) the claimant stated that after she had visited her GP on 27 February 2019, she told Katie Waldron on 5 March 2018 that the GP had believed that her hair loss was a result of stress at work. She further stated that she had shown Katie Waldron the text messages she had received from the boys at work telling her that Gareth Clarke would try to work overtime to be with her. The claimant sought to correct her statement at the outset of her evidence to amend the date given in her statement regarding the date she showed Katie Waldron the tests from 5 March 2019 to 28 February 2019. On cross examination the claimant could not recollect dates.

82. Additionally, and more significantly, on cross examination the claimant completely altered her evidence and accepted, contrary to the statement she had given in paragraph 28 of her witness statement, that she had not in fact shown Katie Waldron the texts; that she had only 'tried' to show Ms Waldron the texts and expressly confirmed that she had not shown them to her. She repeatedly told us that she 'believed' or 'assumed' that management were aware and 'thought' that they knew about her concerns regarding Gareth Clarke.

83. The claimant did not tell Katie Waldron about 8 December 2018 incident and accepted that Katie Waldron did not know about the events of that night.

84. Additionally, whilst she had told Katie Waldron about her hair loss, we accepted the evidence from Katie Waldron, which was that the claimant had not raised any concerns regarding stress at work. Rather that she said her sister had suffered hair loss as a result of stress. There was no medical evidence from the claimant's GP that indicated that it was caused by stress, from work or otherwise

85. Further, the claimant did not complain about Gareth Clarke's conduct towards her whether in January, February or March. In cross examination, she stated that she had complained about his conduct towards all the apprentices, not just her. She also accepted that Gareth Clarke shouted at everyone, not just her. She also accepted that she told him to 'fuck off' when he spoke to her in work and asked her to undertake jobs.

Suspension and grievance

86. On 28 February 2019 day Katie Waldron had cause to speak to the claimant as she had refused to do tasks set to her, namely cleaning the canteen, telling the supervisor Alex Redmund to 'Fuck off'. She was reminded of teamwork and asked to moderate her language.

87. On 5 March 2019, Alex Redmond and Gareth Clarke spoke to Katie Waldron again regarding the claimant's behaviour towards Gareth Clarke, alleging that she had called him a 'fucking money grabber', bleeding Alistair Waldron dry, not working then claiming overtime. Gareth Clarke felt targeted and bullied by the claimant and this was supported by Alex Redmund. They also complained of the claimant's general poor performance at work and her relationship with Lyndon Guppy, which was distracting her at work.

88. As a result, Katie Waldron asked the claimant to a meeting to discuss these concerns. A contemporaneous note was taken of the meeting, the accuracy of which was not challenged by the claimant.

89. At the meeting, Ms Waldron also raised concerns that the claimant had:

a) previously been spoken to about gossiping;
b) refused to listen to an instruction to not leave work to make some tea/had been leaving jobs and talking outside;
c) refused to undertake an instruction to collect a technician from DHL;
d) lacked team spirit.
e) had a problem with discipline and could not take instruction from anyone.

90. There is a dispute as to whether the claimant asked to apologise to Gareth Clarke. Katie Waldron's evidence was that the claimant had asked to apologise to the claimant. This evidence was also reflected in the notes of the meeting. The claimant alleged that Katie Waldron made her apologise.

91. We preferred the evidence of Katie Waldron, which was supported by the contemporaneous note, which we accepted on balance was more likely than not an accurate record of the discussion.

92. We found that after asking if she could apologise to Gareth Clarke, Katie Waldron told her that she could, but that she was being suspended. The claimant did not leave immediately but took time to apologise to Gareth Clarke and remain in the workshop until she was told to leave by Katie Waldron.

93. The suspension was confirmed in a letter dated 6 February 2019, which also confirmed that the allegation supporting the suspension was that the claimant had bullied and harassed other members of staff. The claimant was advised that she was required to co-operate with the respondent's investigations.

Grievance

94. Following her suspension, the claimant left work and went to see a solicitor who advised her to write a grievance.

95. On the following day, on 6 March 2019, the claimant's mother attended the workshop and handed in a hand-written letter from the claimant, dated 5 February 2019, which the claimant stated was a formal grievance of bullying, harassment and victimisation on the basis of sex (the "Grievance").

96. On the same day, ACAS was contacted by, or on behalf of the claimant, to commence the early conciliation process.

97. In that Grievance letter, the claimant:

a) referred to the 8 December 2018 and provided a brief explanation;

b) stated that she did not say anything about his behaviour because she believed it would all blow over particularly after the respondent had changed her shifts.

c) complained that Mr Clarke:

i. would work overtime, and singled her out for abuse even though they were not on the same shift;
ii. alleged that he said things in passing such that others could not hear;
iii. isolated her as he prevented her from talking to her work colleagues;

d) alleged that she found that being told that she was not a '*smiley person'* was offensive as no other member of staff was told the same;

e) stated that she was stressed and that this has resulted in her suffering significant hair loss; and

f) concluded that she believed that this had been as a result of her rejection of Mr Clarke's advances to her. She confirmed that she had contacted ACAS on the instruction of her solicitor.

98. On 11 March 2019 a letter was sent to the claimant inviting her to attend a meeting on Friday 15 March to discuss her Grievance and that this would be chaired by Luke Hillyard, from Key Safety Solutions Limited, a third party who provided HR/Employment law advice to the business.

99. On 15 March 2019 the claimant attended that meeting and was accompanied by Gary Jones, a work colleague. In that meeting the claimant:

a) stated that she had been picked on at the workplace previously, but that when Mr Clarke had started work there he had told her that he had no issue working with women as he had worked with them in the army, and that this had reassured her at the time as Mr Clarke was not far off her age;

b) explained the 8 December 2018 incident in some detail but stated that she was unsure of Katie or Alastair Waldron had been aware of the incident with Gareth Clarke. She confirmed that she had not reported the matter to Katie Waldron.

c) Confirmed that some time a week after the incident, Gareth Clarke had apologised

d) Stated that she believed that Katie Waldron was aware of the incident on 8 December as she had been placed on another shift

e) complained that Gareth Clarke was overly criticising her work and the length of time it took her, accusing her of gossiping when she was taking a drink; that he was

100. The claimant admitted complaining about Gareth Clarke and questioning the amount of his overtime. She also admitted chatting but felt that she was the only one criticised for getting a drink. She did say that Gareth Clarke shouted at all the apprentices.

101. Following the meeting Luke Hillyard emailed the claimant to confirm the points that required a formal response as follows:

a) that the incident on 8 December 2019 was to be investigated as this was considered by the claimant to be sexual harassment;
b) that Gareth Clarke's behaviour changed towards her as a result of that incident and led her to conclude that he was now victimising her;
c) She wanted to understand why Gareth Clarke was complaining about her and why his version of events was preferred over hers.

102. A follow-up meeting took place with the claimant in which she confirmed that Gareth Clarke shouted at all the apprentices and also that she did not know if other apprentices had also been called into the office to be reprimanded.

103. A wider investigation then took place with interviews with a number of staff whereby, in brief:

a) a number of employees (Daniel Gould, Gary Jones and Ross Williams) confirmed that Gareth Clarke shouted at all apprentices:

b) there were mixed views on whether the relationship between the claimant and Gareth Clarke deteriorated post-Christmas 2018;

c) Lyndon Guppy did not see the claimant removed from roles; and

d) Daniel Gould did not see Gareth Clarke single the claimant out.

104. On 4 April 2019 the claimant's representative sought to lodge an ET1 on behalf of the claimant, prior to the Early Conciliation Certificate being issued, contrary to s18B(8) Employment Tribunals Act 1996.

105. On Monday 8 April 2019, whilst on suspension with the respondent, the claimant attended work at another garage, Philip Price, on a trial basis to see if she could work there. She did not believe that she could return to work at the respondent. After two days she left that garage as she did not like the owner, did not like the way he spoke to her or the way he run his garage.

106. A further ET1 was submitted on behalf of the claimant by her legal representatives and received by the employment tribunal on 9 April 2019 following the issue of the Early Conciliation Certificate by ACAS on 6 April 2019.

107. The outcome of the Grievance was sent out by way of letter dated 9 April 2019.

108. In that Grievance letter, in relation to the incident of 8 December 2018 incident, Luke Hillyard concluded that whilst it was not disputed that Gareth Clarke had squeezed the claimant's bottom, he had also squeezed a male employee's bottom. He also found that Gareth Clarke had not intended to sexually harass the claimant.

109. The question of whether it had the effect on the claimant of violating the claimant's dignity or creating the required statutory environment was not touched upon by Mr Hillyard. Despite this, Mr Hillyard stated that he found that his aspect of the claimant's Grievance was upheld. We also found that Mr Hillyard concluded that any continuing conduct of Mr Clarke was did not amount to sex discrimination.

110. We struggled to understand the conclusion of Mr Hillyard in his Grievance outcome letter, that the conduct on 8 December 2018 did not amount to sex discrimination, Mr Hillyard having already accepted that Mr Clarke had slapped and pinched the claimant's bottom.

111. However, on consideration of Mr Hillyard's written statement (in particular paragraphs 17-19,) and on consideration of his responses on cross-examination, we formed the view that Mr Hillyard did not understand the full definition of 'harassment' under the Equality Act 2010 and that he had focussed only on whether Mr Clarke's conduct had the *purpose* of *intimidating* the claimant. He had not addressed his mind to whether the conduct had the *effect* of either violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

112. We found that Mr Hillyard's conclusion in relation to the 8 December 2018 conduct, was a result of his lack of knowledge or understanding of the definition of the sexual harassment.

113. With regard to the allegation that there was a change in Gareth Clarke's behaviour towards the claimant following the December incident, Mr Hillyard found that the shifts were swapped due to change in staff and skill set required and that this was not a decision made by Mr Clarke.

114. He also concluded that following his investigation on balance that Gareth Clarke's conduct towards the claimant following the December incident had not changed but that it had been observed that the claimant's attitude had changed towards GC

115. With regard to the complaint that GC treated her differently to other apprentices because she was female:

    a) he found that there was no practice by GC to treat the claimant differently or single her out, and that due to Alex Redmund's injury, Gareth Clarke had taken responsibility for supervision of both shifts;

    b) That she had been left to work unsupervised when appropriate and not on the basis that she was female but on the basis that she was qualified to undertake the task in hand without supervision;

    c) with regard to time allocated for tasks, that there was no specific time as focus was on the quality of the work and consideration for the fact that the claimant was an apprentice; that the claimant would not be aware of what conversations GC had with other apprentices and had not been singled out;

    d) that the claimant had been reported for smoking, efficiency, work effort and amount of time taken to undertake a job but that the male apprentices too had been reported.

116. With regard to being told that she was not very 'smiley', he concluded that as part of training staff were encouraged to smile and that Kate Waldron was concerned that the claimant had not seemed happy at the workshop and was told that the respondent would support her if she wanted an alternative placement.

117. The Grievance outcome concluded that the claimant had not reported the December incident, or her further concerns about Gareth Clark, until after she had been suspended and based on his findings, whilst Gareth Clarke's supervisory approach was direct, there was no pattern of discriminatory behaviour.

118. We found that his conclusions in relation to continuing conduct of Mr Clarke, post 8 December 2018, were not unreasonable conclusions to have reached in relation to the evidence that was before him as part of his investigation.

119. The suspension of the claimant was lifted as the allegations against the claimant and she was told that she could return to work. The allegations were not considered by Mr Hillyard to be ones of be gross misconduct but confirmed that the respondents may still consider disciplinary action. The claimant was contacted to arrange for her appeal and to discuss her return to work. The claimant did not appeal as she could see no point in doing so.

120. The claimant did not return to work but submitted a self-certification certificate on 12 April 2019 and a FIT note on 29 April 2019.

121. The claimant commenced new employment on or about Monday 29 April 2019, working at an alternative workshop without advising the claimants and on 7 May 2019, the claimant submitted her resignation.

Respondent's submissions

122. The respondent's representative submitted both a skeleton argument and written submissions which the Tribunal will not attempt to summarise but will incorporate them by reference. No additional oral submissions were made at the conclusion of the hearing, but two further emails were sent on 2 October 2019 regarding the time point.

Claimant's submissions

123. The claimant's representative also provided written submissions at the outset of the hearing and further written submissions at the conclusion of the hearing, the focus of the claimant's submission being on the events of 8 December 2018 and the conduct of pinching and/or slapping the claimant's bottom, amounting to sexual harassment.

124. Save for the submissions in relation to the conduct of Gareth Clarke of 8 December 2018, it was difficult to follow what was being argued in the written submissions on the further allegations of harassment and/or victimisation save that the claimant sought aggravated damages in respect of the conduct of the respondent in the proceedings in alleging that the claimant was flirtatious, aggressive, volatile and a troublemaker which they had claimed amounted to further victimisation.

Relevant Law

125. In relation to the direct sex discrimination, s,13 Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'

126. The burden of proof in any discrimination proceedings is set out in s.136(2) and (3) EqA 2010 i.e.

> (2) If there are facts from which the court could decide in the absence of any other explanation that a person (A) has contravened the provision concerned, the court must hold that contravention occurred
>
> (3) Subsection (2) does not apply if A shows that A did not contravene the provision

127. The tribunal has reminded itself of the statutory reversal of the burden of proof in discrimination cases and considered the reasoning in **Igen ltd v Wong [2005] IRLR 258; Barton v Investec Henderson Crosthwaite Securities lyd [20003] IRLR 332 and Madarassy v Nomura International PLC [2007] IRLR 246** where it was demonstrated that the employment tribunal should go through a two stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. The Madarassy case also makes it clear that in coming to the conclusion as to whether the claimant has established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

128. Section 26 EqA 2010 provides that a person (A) harasses another (B) if

a) A engages in unwanted conduct related to a relevant protected characteristic, or
b) engages in conduct of a sexual nature, 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

129. In deciding whether the conduct has the effect referred to above, account must be taken of:

a) the perception of B;
b) the other circumstances of the case;
c) whether it was reasonable for the conduct to have that effect.

130. With regard to the s.26(3) EqA 2010 claims, all the elements of either S.26(1) or S.26(2) EqA 2010 must be made out and in addition, because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if b had not rejected or submitted to the conduct.

131. In s.26(3) EqA 2010 claims the less favourable treatment must be shown and a causal link between the two established. The less favourable treatment is established not by reference to a separate comparator but by reference to the way in which the complainant would have been treated had he or she not rejected or submitted to the harassment.

132. Section 27 EqA 2010 provides that A victimises B if A subjects B to a detriment because-

a) A does a protected act, or
b) A believes that B has done or may do a protected act.

133. A protected act is:

a) bringing proceedings under the EqA 2010;
b) giving evidence or information in connection with proceedings under the Act;
c) doing any other thing for the purposes or in connection with the Act;
d) making an allegation (whether or not express) that A or another person has contravened the Act.

Conclusions

Time Issue

134. One of the issues raised at the case management preliminary hearing was whether the claims had been brought out of time. The claimant's legal representative had originally issued the ET1 on 4 April 2019. The ET1 had not contained an ACAS Reference number and pending vetting was asked for a copy of the Early Conciliation Certificate. She had emailed the tribunal confirming that she had tried to insert the EC Certificate number on the ET1 pro forma, but the website was refusing the accept the EC number.

135. A further copy of the ET1 was posted and received on 9 April 2019 with ACAS EC Reference Number R127865/19/23 indicating that ACAS had received notification of the claim on 6 March 2019 but had not issued the EC Certificate until 6 April 2019 i.e. after the claimant's representative had sought to issue a claim on behalf of the claimant.

136. Whilst the claimant's representative did not seem to understand the provisions of s.18A(8) Employment Tribunals Act 1996, as the claim was presented to the tribunal on 9 April 2019, time having been extended by the ACAS Early Conciliation period, we were satisfied that the claims were brought within the time limits in s.123 Equality Act 2010.

Incident of 8 December 2019

137. All evidence confirmed that Mr Clarke had touched the claimant's bottom, by way of slapping or pinching her bottom, on the night of 8 December 2019.

138. On a common-sense basis, we concluded that it was self-evident that this conduct could be categorised as sexual. It was distinguishable from Mr Clarke's other drunken boisterous behaviour towards other employees that night, male and female. This level of physical contact, on that part of the claimant's body, was likely to be of a sexual nature, as opposed to simply Mr Clarke being generally tactile in drink. It was a sexual advance and was not horseplay, or activity that was an extension of what had taken place in the Escape Rooms earlier that evening.

139. Whilst there was some limited evidence, from a number of the respondent's witnesses and reflected in the Grievance investigation, that the claimant had been considered by some to behave in a slightly flirtatious manner towards Mr Clarke, from when he started work at the end of October and in the weeks leading up to that evening, there was no evidence before us to conclude that on the night in question, there had been any such conduct from the claimant towards Mr Clarke.

140. Even if that had been the case, simply because the claimant was flirtatious, it doesn't follow that this would mean that she would not object to being slapped and pinched on the bottom.

141. Whilst we accept that such sexual advances in a nightclub will not always be unwanted, in this instance the conduct of Mr Clarke was unwanted by the claimant.

142. The claimant had questioned Mr Clarke's behaviour at first instance and had told him to 'Fuck off' when he repeated his conduct. Even if this was the normal sort of language that the claimant used in the workplace, we concluded that the claimant was indicating that she was not receptive to those advances. Whilst we concluded from the numerous reports in the Grievance investigation, that by this point in the evening Mr Clarke was very drunk, it did not detract from the evidence from the claimant that the conduct was unwanted by her. She called her boyfriend and left for the night.

143. Whilst the claimant:

a) did not progress a complaint either informally or formally at that point in time;
b) accepted the apology provided to her by Gareth Clarke in the week following; and
c) did not complain until after she had been suspended

we concluded that the conduct of Mr Clarke that evening was nevertheless unwanted by the claimant.

144. The question of whether that conduct then amounted to sexual harassment depended on whether it had the required statutory purpose or effect under s.26(2) EqA 2010.

145. There was no evidence that the purpose of Mr Clarke's conduct was to violate the claimant's dignity or create the statutory environment required. Rather, we concluded on balance of probabilities that Mr Clarke was more likely than not, intending to have the opposite effect.

146. However, we did conclude that on balance of probabilities, the behaviour did have the effect of violating the claimant's dignity and/or create an offensive environment for her and the claim under s.26(2) EqA 2010 in respect of the conduct of Gareth Clarke on 8 December 2019 was therefore well founded.

147. Whilst we accepted that the claimant did not complain until after she was suspended and also concluded that the complaint at that time was in reaction to the suspension, this did not detract from our conclusion that it did, on the night in question, violate the claimant's dignity and/or create an offensive environment for her.

148. The level of injury on the claimant (whether in terms of feelings only and/or personal injury) will be a matter for determination at any remedy hearing and we make no findings on that at this stage.

Events following 8 December 2018

149. With regard to shift allocations, we concluded that there was no evidence that shifts being swapped, or that the effect of the shifts being swapped, amounted to less favourable treatment of the claimant compared to her male comparators. Rather, the shifts were swapped for all apprentices, including the male comparators, as a result of a change in staff and skill set required.

150. Further, this was not unwanted conduct. Rather the claimant welcomed the change in shift patterns. In any event, the change of shift pattern was not because of sex or because the claimant had rejected the advances of Gareth Clarke.

151. With regard to Gareth Clarke working overtime so that he could be with her on the same shift, we found that there was no evidence of Gareth Clarke working overtime for the purpose of being with the claimant and that it was because of Alex Redmund's injury, that Gareth Clarke had taken responsibility for supervision of both shifts and in turn worked more with the claimant. We further concluded that this was not, in itself, an allegation of less favourable treatment and/or unwanted conduct in itself. Rather it was linked with the claims of less favourable treatment and/or unwanted conduct by Gareth Clarke

152. With regard to the allegation that Gareth Clarke's conduct towards the claimant following the December 2018 Christmas party resulted in less favourable treatment of the claimant and/or unwanted conduct, there was there was insufficient evidence for us to conclude, on balance of probabilities, that the claimant had demonstrated that his attitude or conduct had changed towards her.

153. Whilst there was some evidence that the relationship between the claimant and Mr Clarke had become more strained since December 2018, we found that this arose out of the claimant's behaviour and attitude in work, and in her conduct both towards Mr Clarke specifically and towards the respondent more generally. This resulted in the claimant swearing at Mr Clarke when he asked or instructed her to undertake tasks in the workshop and resulted in her being referred to management to be spoken to regarding her conduct and attitude.

154. We concluded that there was no evidence before us to demonstrate that Gareth Clark singled her out.

155. Having made findings that the claimant had not satisfied us that Gareth Clarke:

a) made her do menial tasks;
b) forced the claimant into situations where she would be alone with him;
c) prevented the claimant from going to lunch;
d) and/or complained about her boyfriend.

but had made further findings that:

e) the claimant had been left to work unsupervised when appropriate on the basis that she was qualified to undertake the task in hand without supervision;

e) with regard to time allocated for tasks, that there was no specific time as focus was on the quality of the work and that consideration for the fact that the claimant was an apprentice had been given; and further

f) that the claimant would not be aware of what conversations Gareth Clarke had with other apprentices regarding their work;

we concluded that the claimant was not able to demonstrate that she had been subjected to less favourable treatment than her male comparators and whilst some of the actions complained of again may have been unwanted conduct to this claimant, there was no evidence, in isolation, to indicate that this conduct related to the protected characteristic of her sex.

156. Again, whilst Gareth Clarke had reported the claimant for smoking, efficiency, work effort and amount of time taken to undertake a job, other male apprentices too had been reported for their own work practices. We did conclude that on balance of probabilities, the claimant had been reported more than others as a result of her own conduct issues but again, in isolation, whilst this may have been less favourable treatment than her male comparators and whilst it may have been unwanted conduct, there was no evidence, in isolation to indicate that this conduct related to the protected characteristic of sex.

157. With regard to the complaint that Gareth Clarke called her '*baldy'*, we concluded that this was, in the context of the claimant's own evidence, neither less favourable nor unwanted treatment whether because of, related to sex or otherwise. The claimant had pleaded that this was a case whereby Gareth Clarke had '*mocked'* her (para 6.15 Amended ET1). The evidence we had heard from the claimant on cross examination contradicted this pleaded case and she admitted that Mr Clarke was trying to be nice to her and she had accepted it as such. We concluded that this was not less favourable treatment because of sex, or unwanted conduct of the claimant related to her sex.

158. Likewise, with regard to the complaint that she was told by Katie Waldron that she would have to get used to Gareth Clarke's style of behaviour as he was ex-army (para 7.7) we concluded that this had not happened, rather the claimant was told by Mr Clarke that he was ex-army and that he was used to working with females and this assured the claimant at the time. We concluded that this was not less favourable treatment because of sex, or unwanted conduct of the claimant related to her sex.

159. With regard to the claimant being told that she was not very 'smiley', we accepted that as part of training all staff, including the male apprentices, were encouraged to smile and that Kate Waldron had not treated the claimant any less favourably to the male apprentices, who were also extorted to smile. If we had found, which we did not, that Katie Waldron had only said it to the claimant, then this may have supported a conclusion of, or an inference of, discrimination so as to shift the burden of proof to the respondent. The claimant had not demonstrated that there had been less favourable treatment in this regard compared to her comparators of the male apprentices. Likewise, she was unable to demonstrate that even if this was unwanted conduct it related to her sex.

160. We accepted that the claimant had been told to watch her language but also accepted that the claimant's bad language was on a higher level than the other male apprentices or indeed anyone in the workshop. This wasn't the case whereby bad language was unacceptable from a female employee, yet the same bad language was acceptable from a male employee. This was therefore treatment and conduct that the claimant did not demonstrate was because of or related to her sex.

161. We also accepted that Kate Waldron was concerned that the claimant had not seemed happy at the workshop and told the claimant that respondent would support her if she wanted an alternative placement, we did not consider this to be less favourable treatment. Rather it was an instance of the respondent seeking to support the claimant. The claimant was not able to demonstrate that this was less favourable treatment and we did not conclude that at the time it was wanted conduct either. For the avoidance of doubt, even if it was unwanted conduct, we did not in isolation conclude that this conduct related to the protected characteristic of sex.

162. We did not accept or find that the claimant had made any complaint about Mr Clarke prior to her grievance. Her complaint that in January 2019, the respondent had failed to deal with the complaints and/or told the claimant to 'get used to it', was not proven. Having made a finding that the claimant had asked Kate Waldron if she could apologise, we did not conclude that the claimant had established that she had been told to 'make up with everyone'.

163. Having looked at each matter complained of in isolation from each other and not made findings of discrimination, we also looked at the complaints and our findings in relation to the allegations on a collective basis to ascertain whether, from the totality of the treatment, we could draw any inferences of potential discrimination because of or related to sex. We concluded that that there was not.

164. We therefore concluded that the claimant had not satisfied us that she had been treated less favourably because of her sex and/or had not been subjected to harassment related to her sex. The claimant has adduced no evidence that the treatment of her could be related to sex. She has not, in our minds, demonstrated that she has even been treated differently to her male comparators in relation to many of her complaints as indicated.

165. We were also satisfied that even if the burden of proof had shifted, the respondent has given fully adequate explanations as to why they behaved as they did, and we are satisfied that it had nothing to do with the claimant's sex.

166. Therefore the complaints, that the conduct of Mr Clarke and/or the respondent more generally, following the Christmas party was less favourable treatment because of sex or unwanted conduct related to sex were not well founded.

167. With regard to our consideration of the complaints under s.26(3) EqA 2010, whilst elements of sexual harassment had been made out in relation to the conduct of Mr Clarke on 8 December 2018, we then had to turn our minds to the question of whether, because of the claimant's rejection to the harassment, Mr Clarke and/or the respondent more generally, treated the claimant less favourably than they would treat the claimant if she had not rejected the harassment.

168. This required us to consider whether the claimant had established that:

a) there had been less favourable treatment; and
b) whether a causal link between the two had been established by the claimant

by reference to the way in which the claimant would have been treated had she not rejected the harassment.

169. In giving this our consideration, it was for the claimant to show less favourable treatment and we acknowledged that the perpetrator would not necessarily be the same person that carried out the original harassment and could be a different perpetrator as had been alleged by the claimant.

170. Adopting our conclusions on the less favourable treatment in relation to sex and unwanted conduct related to sex, we concluded that the claimant was unable to demonstrate on balance of probabilities any causal link between the treatment complained of, and her rejection of Mr Clarke's harassment on the night of 8 December 2018.

171. We did scrutinise the alleged acts of Mr Clarke, following the night of 8 December 2018, to determine whether we could draw an inference of less favourable treatment because the claimant had rejected him.

172. With regard to many of the allegations, we had concluded on balance of probabilities that the conduct complained of did not arise at all (e.g. sexually suggestive remarks, made to do menial tasks, forced into situations to be alone with Mr Clarke, prevented from going to lunch; given less time to complete tasks; removed from jobs and complained about her boyfriend, told to apologise and/or '*get used'* to Gareth Clarke's style of management,) or did not amount to less favourable treatment (e.g. change in shift pattern, told to smile, called '*baldy'*).

173. The only issue which might have inferred that the claimant had been treated less favourably because she had rejected Mr Clarke, was that he had complained more to Katie Waldron about her conduct than he had complained about others. Whilst we were not satisfied on balance of probabilities, that there was sufficient evidence to conclude that the claimant had been sent to Katie Waldron more than others, we also concluded that even if that was wrong, and there was sufficient evidence to shift the burden of proof to the respondent, we were satisfied that the respondent had demonstrated the reason for the treatment, namely that the claimant's attitude, conduct and performance in work warranted the difference in treatment of the claimant compared to other employees (who had not been subjected to and rejected Mr Clarke's advances).

174. On that basis, the complaints regarding the conduct of Mr Clarke, amount to harassment under s26(3) EqA 2010 were not well-founded.

175. With regard to the other alleged acts of the respondent, and specifically the acts of Katie Waldron, and whether any complaint was one of less favourable treatment

because the claimant had rejected Mr Clarke, in giving this our consideration, we also had in mind our finding that until the Grievance complaint Katie Waldron was

a) not aware of the behaviour of Gareth Clarke towards the claimant at the Christmas party; in turn
b) not aware that of the claimant's rejection of those advances; and
c) not aware of the claimant's complaints about Gareth Clarke's conduct towards her following the Christmas party.

176. With regard to the suspension, this was carried out by Katie Waldron on 5 March 2019, as a result of complaints having been made about the claimant's conduct. The claimant submitted her Grievance on the following day, 6 March 2019.

177. Having found that the claimant had not complained about Mr Clarke (whether in relation to his behaviour toward her on 8 December 2018 or in work subsequently,) until her Grievance submitted on 6 March 2019, we also concluded that the only act that was capable of being a 'protected act' for the purposes of bringing a victimisation claim under the EqA 2010, was the claimant's Grievance.

178. With regard to the complaint that the suspension and handling of the Grievance (para 11.2 Amended ET1) amounted to direct discrimination under s.13 EqA 2010 or harassment under s26(1) EqA 2010 we concluded the following:

a) We were not satisfied that the claimant had demonstrated facts from which we could find or infer sex discrimination arising from the suspension. The claimant had not proven on balance that she had been treated less favourably than a male apprentice would have been treated had similar complaints been made about him to the respondent.

b) Whilst we accepted that suspension would have been 'unwanted conduct', we were not satisfied that the unwanted conduct of suspension was related to the claimant's sex, on a similar basis even though no direct comparison was necessary.

c) We concluded that there were no facts from which we could conclude or infer sex discrimination and that the suspension itself was not an act of direct discrimination nor unwanted conduct related to the claimant's sex.

179. We also concluded that the suspension was not an act of harassment under s.26(3) EqA 2010. We concluded that the claimant was not suspended because of her rejection of Mr Clarke. Having found that Katie Waldron made the decision to suspend the claimant, prior to having knowledge of either the conduct of Gareth Clarke and/or the claimant's rejection of Mr Clarke's behaviour from the Christmas party, this was not the cause of the suspension.

180. Further, the suspension itself was not capable of being a detriment under s.27 EqA 2010 because the protected act, the Grievance, took place after the suspension had been determined and actioned (para 11.1 Amended ET1). It follows, for the avoidance of doubt, that all and any other complaints of victimisation arising prior to the point of submission of the Grievance on 6 March 2019 were not, and were not capable of amounting, to acts of victimisation.

181. With regard to the conduct of the grievance investigation and its outcome, in particular the respondent's failure to conclude that the claimant had been subjected

to sexual harassment on 8 December 2010, we concluded that failure to manage or deal with a complaint of discrimination was capable of amounting to less favourable treatment (under s.13 and under s.26(3) EqA 2010). It was also capable of amounting unwanted conduct. However, to succeed in either of her complaints the claimant had to demonstrate to us that she was subjected to the treatment because:

a) she was female; or
b) she rejected Mr Clarke.

182. In this case we found that the respondent had engaged independent HR services who had investigated the allegations thoroughly. We accepted that Mr Hillyard had not avoided the question of what had happened on the night of 8 December 2018 and had also had not avoided concerns regarding Mr Clarke's behaviour since that evening. It was accepted in the report that Mr Clarke had touched the claimant.

183. What we did conclude was that Mr Hillyard had not applied the correct test to his findings in relation to Mr Clarke's behaviour on the night of 8 December 2018. He had found that Mr Clarke had touched the claimant on the bottom but concluded that this was not sexual harassment due to lack of intent.

184. Whilst we were surprised at Mr Hillyard's Grievance conclusion in relation to the 8 December 2018, that despite him finding that Mr Clarke had touched the claimant in the manner alleged, the conduct did not amount to sexual harassment, we were satisfied that Mr Hillyard had simply applied the wrong test of whether or not that conduct amounted to harassment to reach his Grievance outcome. We concluded that he had focussed solely on the question of what Mr Clarke's intent or purpose conduct was, having stated in his outcome that it was not Mr Clarke's '*intent to cause you to feel in such a way'*. He did not put his mind to the issue of the effect of the conduct on the claimant beyond noting that she had not complained at the time.

185. Whilst this was a confusing outcome for the claimant, we did not conclude however that this outcome would have been any different even if the claimant had been male. Had the male apprentices brought such a complaint, there was no reason to suggest that Mr Hillyard would not have made the same mistake on any grievances brought by them.

186. On that we basis we did not find sex discrimination, nor did we infer sex discrimination, whether as a result of direct sex discrimination (s.13 EqA 2010) or harassment related to sex (s26(1) EqA 2010) arising from the handling of the Grievance, including the outcome of the Grievance.

187. We then turned to the claim under s26(3) EqA 2010, on the question of whether the handling of the complaint gave rise to less favourable treatment of the claimant because she had rejected Mr Clarke (para 11(2) Amended ET3). The claimant had sought to amend this aspect of her claim from one of victimisation under s.27 EqA 2010, to one of harassment under s26(1) and or s26(3) EqA 2010.

188. The claim under s26(3) EqA 2010 was in some ways similar to a victimisation claim in that it required the claimant to establish less favourable treatment and then a causal link between the act (sexual harassment (s26(3) EqA 2010) or 'protected act' (s.27 EqA 2010)) and the alleged less favourable treatment.

189. Even though it was not clearly argued by the claimant's representative, we accepted that the less favourable treatment / unwanted conduct claimed was essentially the

lack of finding that the events of 8 December 2018 had amounted to sex discrimination.

190. Whilst we did accept that the nature of the complaint i.e. one of sexual harassment arising out of the claimant's rejection of Mr Clarke's conduct, meant that there was a possibility that the complaint would not be dealt with in the way that other complaints would be dealt with (as there was a possibility that an employer such as the respondent, might shy away from and/or not want to have findings of sexual harassment,) we did not conclude that his had happened in this case.

191. There had been a detailed investigation by Mr Hillyard which had specifically addressed the conduct of Mr Clarke, both on the evening of 8 December 2018 and subsequently.

192. We concluded that outcome of the Grievance was less favourable treatment/unwanted conduct. Whilst the investigation was thorough (and not less favourable treatment,) the outcome was flawed as it did not address the question of the effect of the conduct on the claimant.

193. The claimant had not satisfied us on balance of probabilities however, that there was any causal link between her rejection of Mr Clarke's advances and the outcome of her Grievance.

194. Whilst we did conclude that there had been a failure by the respondent, through Mr Hillyard, to make clear findings on whether the actions of Mr Clarke on the night of 8 December 2018 amounted to sex discrimination, we did not conclude that this in itself gave rise to an inference of discrimination i.e. less favourable treatment of the claimant because she had rejected the advances of Mr Clarke. As such, the claimant has not discharged the burden of proof and the claim fails.

195. Again, if we were wrong on that, and the burden has been discharged by the claimant, for the same reasons that we did not conclude that the Grievance outcome was because of or related to sex, we were satisfied that the reason for the Grievance outcome was Mr Hillyard's error and not because of the rejection of Mr Clarke's conduct (or, for the avoidance of doubt because the claimant brought the Grievance).

196. The complaint of harassment under s.26(3) EqA 2010 (and/or s.27 EqA 2010) therefore fails in relation to the handling of the Grievance.

197. With regard to the victimisation complaint, the respondent's reference in the Amended ET3 to the claimant being '*flirtatious, volatile and aggressive'* and a '*trouble-maker, manipulative and flirtatious a key feature that is continuing since leaving her employment'* is being relied upon as a further act of victimisation by the claimant.

198. We concluded that the relevance of the claimant's own behaviour, sexual and otherwise, can be taken into account when assessing whether the conduct was unwanted and whether it met the relevant statutory effect or purpose for s.26(1) and/or s.26(2) EqA 2010 claims.

199. The claimant's own conduct was relied upon by the respondent, both during the internal Grievance investigation and we heard evidence on these issues during the hearing and were asked to and did take them into account when making our findings and drawing conclusions on the s.26(1) and s.26(2) EqA 2010 harassment allegation.

200. We therefore considered that whilst the pleadings would have upset the claimant, thereby causing her a detriment under s.39(4)(d) EqA 2010, the defence of the claim, and in particular references made in the Amended ET3, was a step the respondent had taken to preserve its position in this litigation. It was relevant to issues of whether the claimant had been subjected to discrimination, the effect of the conduct complained of on the claimant and whether the respondent, if necessary, could demonstrate why it took the steps that it took in relation to the claimant, such as suspension.

201. We concluded that the respondent's conduct, in referring to the claimant's conduct in the terms set out in the Amended ET3 were honest and reasonable attempts to defend the proceedings and not because the claimant had brought her Grievance.

202. We therefore did not conclude that the claimant had been victimised in this regard.

203. Finally, turning to the constructive dismissal claim, and the issue of whether that amounted to direct sex discrimination and/or sex harassment under s.26(1) or s.26(3) EqA 2010, the claimant had complained (para 12 and 13 Amended ET1,) that the despite the Grievance complaining of sexual harassment, the outcome of the Grievance did not resolve her complaints and no apology was made on behalf of the respondent; that as a result of this she was unable to return to work and had lost all trust and confidence in the respondent's ability to stop harassment.

204. There was no constructive unfair dismissal claim before us as the claimant did not have two years' continuous service. However, if she had, she would need to demonstrate that

    a) there had been a fundamental breach of contract which breached the implied term of trust and confidence;
    b) she had not 'affirmed' the contract i.e. acted in a manner which indicated that she remained bound by the terms of the contract; and
    c) she resigned in response to the breach i.e. demonstrated that the breach was a reason for the resignation.

205. Whilst we accepted that the actions of Mr Clarke on 8 December 2018 was sexual harassment, the claimant had not resigned in response to this. Indeed, the claimant had not resigned until the outcome of her Grievance from Mr Hillyard.

206. The Grievance outcome, in relation to the 8 December 2018 behaviour of Gareth Clarke, that there had been no sex discrimination, was at odds with his findings that the claimant had been touched by him, but we did not consider that this alone would have entitled the claimant to treat the contract as at an end. This was insufficient in itself, to demonstrate that there had been a fundamental breach of contract.

207. Even if it had been our conclusion that the Grievance outcome had breached trust and confidence entitling the claimant to resign, this was not a reason for her resignation in this case. Rather, we concluded, the reason was because the claimant's suspension had been lifted, and she was asked to return to work by the respondent at a time when she had already obtained, and was working in, gainful and alternative employment.

208. Even if it had been our conclusion that the Grievance outcome had breached trust and confidence, enabling the claimant to resign, as we have concluded that there has been no discrimination because of or related to sex, or on the basis that the

claimant had rejected Mr Clarke's advances, in relation to any of the conduct after 8 December 2018, we further concluded that any constructive dismissal of the claimant was not because of, or related to, the claimant's sex, or because the claimant rejected Mr Clarke's harassment.

209. Therefore, the claimant has not satisfied us that the constructive dismissal was:

a) less favourable treatment because of sex; or
b) unwanted conduct related to sex; or
c) less favourable treatment because the claimant rejected the harassment of Mr Clarke on 8 December 2018.

Decisions

210. We therefore concluded that whilst the claim under s.26(2) Equality Act 2010 ("EqA 2010") in respect of the unwanted conduct on 8 December 2018 was well founded, the claimant's remaining claims under s.13 EqA 2010, s.26(1) EqA 2010, s.26(2) EqA 2010, s.26(3) EqA 2010 and/or s. 27 EqA 2010 were not well-founded and are dismissed.

211. The hearing should be resumed and listed for one day, before an employment tribunal judge sitting with non-legal members, to hear from the claimant as to remedy and to consider oral submissions.

212. As the matter was originally listed to consider both liability and remedy no further case management orders need to be made.

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Employment Judge R Brace
Dated: 26 November 2019

ORDER SENT TO THE PARTIES ON 26 November 2019

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS