**EMPLOYMENT TRIBUNALS**

**Claimant:** **Sonia Bryan**

**Respondent:** **Travelodge Hotels Limited**

**Heard at:** **London Central** **On:** **30 Sept, 1 and 2 Oct 2019**

**Before:** **Employment Judge A James**
**Mrs Chavda**
**Mr Simon**

**Representation**

Claimant: Ms Romage-Hayes, FRU
Respondent: Ms C Urquhart, counsel

**Background**

Judgment in this case was sent to the parties on 7 October 2019, oral judgment having been delivered on 2 October 2019 at the conclusion of the hearing. A request for written reasons has subsequently been made. Those reasons follow.

# WRITTEN REASONS

**Claims and issues**

1. The claimant (referred to in the rest of this judgment as Ms Bryan) brings a claim for sexual harassment, breach of contract and unpaid wages against the respondent (referred to in this judgment as Travelodge). The issues were identified by Employment Judge Glennie at a preliminary hearing for case management held on 28 December 2018 as follows:

    1) *On 5 December 2017 during the interview for the job, Ms Bryan told Mr Chris-Kuye that she was feeling nervous. He replied, "don't worry you got the job because I like you". Ms Bryan's concern is about the way in which this was said rather than the words themselves.*

    2) *Within a week of Ms Bryan starting the job on 11 December 2017, Mr Chris-Kuye whispered that he liked her, at a time when no one else was*

*around and in a way that gave her the impression that he meant this in a physical sense.*

3) *On other occasions during Ms Bryan's employment when no one else was around, Mr Chris-Kuye whispered that he liked her and at times put his hand on her back. He also asked how she was, and she would reply that she was good.*

4) *On a day in February 2018 when Ms Bryan was on the way home, Mr Chris-Kuye asked in a whispering tone which floor she was working on the following day. When Ms Bryan told him, Mr Chris-Kuye said he was coming to see her in her rooms. Again, Ms Bryan was concerned with the manner in which this was said and Mr K's body language, rather than with the words themselves.*

5) *Mr Chris-Kuye arranged for daily 1 o'clock break meetings of the staff. He would wait for Ms Bryan to come into the meeting, and then would suddenly come in after her, as if he had been watching her. He would then talk to Ms Bryan and another female colleague, such that other colleagues noticed that he behaved differently towards Ms Bryan from how he did to others.*

6) *On a day in March 2018 during one such meeting the female colleague mentioned above said "I should smack him; I should smack him" to a porter. Mr Chris-Kuye heard this and asked, "Who do you want to smack, May, me?" And then said to Ms Bryan "What about you, Sonia, do you want to smack me too?" Ms Bryan considered that this was some kind of sexual innuendo.*

7) *At a meeting on 18 April 2018 Mr Chris-Kuye offered to treat all housekeepers to ice cream the following day. Ms Bryan said that she did not want any; Mr Chris-Kuye asked why and she replied that she was on a diet. Mr Chris-Kuye commented "Sonia likes vanilla ice cream anyway", meaning that she did not like black men.*

2. We first had to decide whether the incidents occurred, as alleged. Second, whether they amounted to unwanted conduct. Third, and if so, whether those incidents were related to the claimant's sex (there being no allegation under S.26(2) Equality Act 2010). Finally, we were required to determine whether the conduct had 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.

3. As for the breach of contract claim, the question was whether the respondent breached the claimant's contract by not paying her notice pay with her final pay.

4. The claim was heard over three days. There was an agreed trial bundle. Ms Bryan gave evidence in support of her case. The tribunal heard evidence from Mr Chris-Kuye for the respondent. Submissions were then made by both parties' representatives and the tribunal deliberated on the afternoon of the second day. Oral judgment was delivered on the third day. Unfortunately, although the claimant's representative subsequently

requested written reasons, that request was not passed to Employment Judge A James until 17 December 2019. Hence the delay in providing them.

**Application to amend**

5. The claimant's representative made an application to amend the claim to include further allegations of sexual harassment and victimisation on the first day of the hearing. Following representations by both parties we adjourned to consider the matter. We rejected the application to amend for the following reasons.

6. The application was for the inclusion of further allegations of sexual harassment against a further individual, Ms Raluca Giba, as set out in the claimant's representative's letter to the Employment Tribunal of 24 September 2019. The claimant, through her representative, applied at the hearing to further amend her claim to include a claim of victimisation, contrary to section 27 Equality Act 2010.

7. The power to grant amendments is contained in Rule 29 of the Employment Tribunals Rules 2013, combined with the general power, in Rule 41, to regulate our own procedures, having regard as always to the overriding objective in Rule 2.

8. In deciding on the application, we have also had regard to the well-known principles in Cocking v Sandhurst [1974] ICR 650, and Selkent Bus Co Ltd v Moore [1996] IRLR 661.

9. As to the nature of the amendment, we do not consider that this can simply be called a relabelling exercise. The amendment includes a whole series of further allegations of sexual harassment of the claimant by a different individual. On the first day of the hearing, for the first time, a further application has been made to add a claim of victimisation, which involves the introduction of an entirely new cause of action. Such a claim was not apparent from the claim form.

10. As to the applicability of time limits, we bear in mind that this is only a factor in the case but is not determinative in itself. The application to amend to add further claims is clearly being made well outside of the usual three-month time limit. Had it been necessary for us to have done so, we think it unlikely that we would have found it just and equitable to extend the time limit by some 14 to 15 months. In saying that, we take due notice of the difficulty the claimant has experienced in obtaining legal advice. However, she knew the facts giving rise to this application at the time of her original claim and could have put these details before the tribunal at an earlier stage.

11. As to the timing and manner of the application, again we have some sympathy with the difficulties the claimant has experienced in obtaining advice. However, this is a case which has been progressing for some time. At the closed preliminary hearing in December 2018, Judge Glennie assisted the claimant by identifying the claims he could elucidate from the claim form and further information provided by her. A period of over nine months has elapsed since then. The case was originally listed for hearing in May 2019 but that had to be adjourned due to the lack of a panel to hear

it. Were we to grant the application today, on the first day of the hearing, the case would have to be adjourned yet again, an amended response submitted, further documentary and witness evidence would need to be submitted and a fresh hearing listed for next year, 2020.

12. We note that it was also argued before us whether the facts could amount to sexual harassment in any event, given that this is a claim where it is alleged that the perpetrator was antagonistic towards the claimant, because the alleged perpetrator was in an (alleged) relationship with another individual, who the perpetrator thought was attracted towards the claimant. There is we note an interesting academic debate as to whether that could amount to sexual harassment. It is not however necessary for us to decide that, given our conclusions below. As to the strength of the evidence, since we are yet to see any of that, it would in our view be wrong to express a view on it.

13. We have weighed the above issues in the balance, when considering the balance of hardship test and any other relevant circumstances. Bearing in mind the above, the unanimous decision of the tribunal is that the application of 24 September should be refused together with the further application to add a claim victimisation on the first day of the hearing (and on which we would have needed to see a properly pleaded amendment before we could finally rule on it, had we been minded to grant it).

14. This application involves adding both a new cause of action – victimisation - and a further series of factual allegations in relation to the further claim of sexual harassment against another individual. Whilst we take notice of the difficulty individuals now face in obtaining legal advice, that has to be balanced against the time this case has been progressing through the employment tribunal system, the fact that the application is made substantially outside the usual three month limit, the fact that the closed preliminary hearing took place on 28 December 2018, over nine months ago, the fact that this is the second time it has been listed for a full hearing, the length of time the case would take to progress to a further hearing if the amendment was allowed today, and that the cogency of evidence after this further length of time could be adversely affected. For all of these reasons, the amendment application was refused.

## Findings of fact

15. We set out below the agreed facts; followed by general fact findings relevant to the claims; followed by specific findings of fact relating to each of the allegations of sexual harassment and the breach of contract claim.

### Agreed facts

16. Ms Bryan was interviewed for the position of Team Member - Housekeeping by Mr Chris-Kuye on 5 December 2017. She commenced work for the company on 11 December 2017. She had a probation review with her then-manager Shelly Ryan on 9 January 2018. On 15 March 2018 she attended a first probation review meeting with Robyn Keane, Assistant

Hotel Manager. The outcome of the meeting was that her probation was extended to 11 April 2018.

17. She attended a second probation review meeting with Robyn Keane on 11 April 2018 the outcome of which was that her probationary period was extended to 9 May.

18. On 1 May 2018 Ms Bryan attended a meeting with Robbie Keane to raise concerns about alleged bullying treatment by Raluca Giba a supervisor. In an email dated 1 May 2018 Ms Keane asked the HR department for advice on what to do with her potential complaint, given that she was considering dismissing Ms Bryan for poor performance.

19. On 4 May 2018 Ms Bryan was dismissed at a meeting with Ms Keane on the grounds that she had failed her probationary period. She appealed against the dismissal on 7 May 2018. The dismissal appeal hearing took place on 14 June 2018 and was chaired by Lee Telford, Hotel Manager at the London City Road hotel. She was provided with the outcome of the appeal on 6 July 2018. Her appeal against dismissal was not upheld. She subsequently went through Acas early conciliation, which commenced on 9 July 2018. She submitted her ET claim on 29 August 2018.

General facts relevant to the issues

20. Before we look at the specific incidents of sexual harassment complained of, we consider it helpful to make fact findings in relation to the meetings which were arranged for on or about 6 April and 17 April 2018 and related events.

21. We find that Ms Bryan and May had approached Mr Chris-Kuye and asked for a meeting because they were concerned about the behaviour of a supervisor, Raluca Giba, towards them. We accept Ms Bryan's evidence that separate meetings were arranged, with her on 6 April, and with May on 9 April. Those meetings did not take place.

22. As a result, Ms Bryan asked for a meeting with Ms Keane. Ms Keane organised a meeting for 17 April. Mr Chris-Kuye was asked to attend that meeting as well. Ms Bryan says that at that meeting she intended to raise allegations of the alleged harassment that she had been suffering from Mr Chris-Kuye leading up to that point. It is not disputed that Ms Bryan did not raise any such concerns at that meeting. At page 59 of the agreed bundle there is an email from Ms Bryan to Ms Keane thanking her for the meeting and stating: "We did not discuss the issue of concern. I appreciate that I can rely on you if I wish to discuss any further issue of concern".

23. We find as a fact that the issue of concern which Ms Bryan was concerned about at that stage and intending to raise was the alleged bullying by Raluca Giba, not the alleged harassment by Mr Chris-Kuye.

24. Following Ms Bryan's dismissal on 4 May, she appealed against her dismissal in writing. Her email of 7 May 2018 is at page 67 of the agreed bundle. In that email she states, at the end of paragraph 4, that Ms Keane had "only been in our apartment for two months and did not have full insight of what was taking place." She alleged that her dismissal was

linked to the meeting with Ms Keane on 1 May "in which I expressed that I was unhappy with how I have been treated at Travelodge from a staff member". We find as a fact that the staff member that Ms Bryan was referring to at that stage, was Ms Giba, not Mr Chris-Kuye.

25. We consider it significant that in her appeal letter of 7 May 2018, Ms Bryan did not raise any specific allegations against Mr Chris-Kuye. We accept Ms Bryan's contention that during her employment she would have been reluctant to make any allegations of sexual harassment against Mr Chris-Kuye because she was in her probationary period and that had been extended. We see no reason why however, had there been significant issues with Mr Chris-Kuye's behaviour towards her prior to her dismissal, that those would not have been raised in the appeal letter of 7 May 2018, rather than those matters only being raised at the appeal meeting itself on 14 June 2018. We will come back to this point later, where the factual questions are more finely balanced.

The facts relevant to the factual and legal issues

*"I like you" comment at interview - Issue 1 (1)*

26. Mr Chris-Kuye did not deny that the words were said. We accept his evidence that those words were said at the end of the interview, when he was sitting opposite Ms Bryan, and he noticed that she was nervous. He then said words to the effect of "don't worry, you interviewed well, I like you, you're experienced, you've got the job". We find that when he said those words, he was not bent over Ms Bryan, and nor did he whisper them to her.

*"I like you" comment about a week after interview – Issue 1 (2)*

27. The thread running through both this incident, the incident described above, and the following two incidents, is the allegation that Mr Chris-Kuye whispered to Ms Bryan when he said that he liked her. The implication is that he was flirting with her, which could well be related to Ms Bryan's sex, if that is what occurred. We found this to be a finely balanced issue on the facts but one where ultimately we found on the balance of probabilities that the incidents did not occur as alleged by Ms Bryan. In particular, Mr Chris-Kuye did not whisper to her in a flirtatious manner and did not tell the claimant that he liked her. In coming to that finding, we refer to the point in paragraphs 23 to 25 above, about us finding the claimant's evidence unreliable, on occasions; for example, in relation to the April meeting, and the 7 May 2018 appeal letter.

*"I like you" comment on other occasions; touching her on her back – Issue 1 (3)*

28. In relation to the allegation that Mr Chris-Kuye asked Ms Bryan how she was, we accept Mr Chris-Kuye's evidence that he would ask all his staff

how they were. We further accept that he did not keep saying to her that he liked her. That was an isolated comment, made at the interview. We also find that he did not touch her on her back.

29. In his evidence, Mr Chris-Kuye stated that he was a very busy manager, had over a hundred staff to manage, and simply would not have had time for the type of flirtatious interactions that were alleged by Ms Bryan. We accept that Mr Chris-Kuye was and is a very busy manager, and that it would be unlikely that he would come across Ms Bryan alone very often. However, we do not accept that just because he was busy he would not have had the time to flirt with Ms Bryan, had he chosen to do so. Having said that, then as in relation to the above issue, we find, on the balance of probabilities, that these alleged incidents of 'flirting' did not take place.

*The "coming to see you in your rooms" comment – Issue 1 (4)*

30. For the same reasons as set out in relation to the first claim above, we do not accept Ms Bryan's evidence that Mr Chris-Kuye kept whispering to her in the flirtatious manner alleged. We accepted Ms Bryan's evidence that a conversation did take place about Mr Chris-Kuye coming to check one of her rooms. We find however that the reason for that conversation was Mr Chris-Kuye's position as the General Manager. It was part of his responsibilities to check the rooms of underperforming staff together with the staff member's assistant manager. We find that was the context of that particular conversation. The comment was not made in a flirtatious manner.

*Daily 1 o'clock meetings – Issue 1 (5)*

31. As noted above, it was part of Mr Chris-Kuye's job to check on the staff working in the hotel under his overall management. He did work in the bar area on his laptop. Ms Bryan perceived that he waited for her to come into those meetings and then came in after her – in effect, she complains that he was stalking her. We accept that was her perception – but we do not consider that was a reasonable perception. We find that Mr Chris-Kuye's attendance at those meetings and his interactions with Ms Bryan at them was done in the context of his role and was not in any way inappropriate, as alleged.

*"Do you want to smack me too" comment – Issue 1 (6)*

32. We preferred Ms Bryan's evidence in relation to this incident. She was adamant that it had taken place. There is some independent evidence corroborating that in the note on page 94 of the bundle. This is an interview by the appeal manager Mr Telford with Ms Bryan's colleague May where it is stated towards the bottom of the page: "Slap comment not in a sexual way at all it was banter". This provides some corroboration, albeit hearsay, that a comment to the effect that the words which Ms Bryan alleges were indeed used. We also take note that in relation to this

particular matter, Mr Chris-Kuye's written and oral evidence was that he did not "recall the comment"; not that it did not take place at all. We find therefore that the words were used. We consider below the other parts of the test in relation to this incident.

*The vanilla ice cream comment – Issue 1 (7)*

33. It is not in dispute that there was a discussion about buying ice creams for staff which Mr Chris-Kuye initiated on that day. We also find that there was a specific discussion with Ms Bryan, who stated that she was on a diet, and therefore did not want ice cream. We also find that Mr Chris-Kuye said words to the effect that Ms Bryan should speak to her supervisor about that, so an alternative could be bought for her. We find that a comment to the effect of "Sonia likes vanilla ice cream" was made. Again, we consider the implications of that comment below in our conclusions.

34. We note in relation to remark that it was Ms Bryan's case that the motive behind Mr Chris-Kuye offering staff ice creams on 18 April 2018 was that at the meeting on 17 April 2018 Mr Chris-Kuye knew that Ms Bryan was going to complain about his behaviour. She says that he was highly relieved at the end of that meeting, when she said that she was not going to complain about the 'other matters'.

35. We accept that it is Ms Bryan's honest view that was Mr Chris-Kuye's motive. However, we conclude that is demonstrative of Ms Bryan building up her own narrative about things which occurred, after the event, much of which we find did not occur as she alleged. We find that Ms Bryan's perception that Mr Chris-Kuye's motive in offering ice creams for staff was because he was relieved about Ms Bryan not complaining about him was incorrect. Further, in relation to the meeting on 17 April 2018, whilst we note that Ms Bryan was adamant that Mr Chris-Kuye knew at that meeting that she was going to complain about him, we accept Mr Chris-Kuye's evidence that he had no inkling of the sort. There was no reason why he would have. He offered to buy ice creams because it was a hot day.

*Breach of contract*

36. In addition, Ms Bryan complains that there has been a breach of contract, in that her notice pay was paid late, and that the sum of £40.51 was deducted for tax and National Insurance. The payment was made late - on 24th of August 2018 – rather than in her final wage in May, as it should have been.

37. Ms Bryan gave evidence that when she was working, she was not paying tax, because her earnings were below the taxable threshold. We accept her evidence on that point.

**The law**

38. Section 26 Equality Act 2010 reads:

> ***26 Harassment***
>
> *(1) A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *(2) A also harasses B if—*
> *(a) A engages in unwanted conduct of a sexual nature, and*
> *(b) the conduct has the purpose or effect referred to in subsection (1)(b).*
>
> *(3) ……*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*

39. The case was put as a s26(1) type case, not 26(2). We first have to determine whether the conduct took place at all. If so, was it unwanted conduct? If so, was the conduct related to sex? If so, whether the person responsible for the conduct had the proscribed purpose; and if not, whether the conduct had the proscribed effect, taking into account (a) the perception of B; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

40. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision. This is not a case where we were particularly assisted by the burden of proof provisions. We had to consider whether the conduct occurred, as alleged. In those instances where we found it did, we considered the other elements of S.26, as set out above.

41. We were referred to two legal authorities. First, Richmond Pharmacology v Dhaliwal [2009] IRLR 336 in which Underhill J (as he then was) said at paragraph 15:

> *A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase 'having regard to … the perception of that other person' was liable to cause confusion and to lead tribunals to apply a 'subjective' test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like,*

*be described as introducing a 'subjective' element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt*

42. Second, we were referred to Land Registry v Grant [2011] ICR 1390 in which the head note records:

*When assessing the effect of a remark, the context in which it is given is always highly material. A humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.*

## Conclusions

43. In relation to the issues set out at paragraphs 1(2), (3), (4) and (5) we conclude that those claims are not well-founded and do not succeed since we have found that they did not occur as alleged.

44. In particular, regarding 1(2) and (3), Ms Bryan may have formed the impression that Mr Chris-Kuye was attracted to her but we do not consider that her perception was a reasonable one. We found that he did not act in a flirtatious manner towards her by whispering for example and bending down towards her and did not keep saying that he liked her. He would ask all of his staff how they were, there was nothing untoward in that. He did not touch her on her back. Those incidents did not therefore take place as alleged and the facts as found cannot be said to be unwanted conduct or related to Ms Bryan's sex.

45. As to 1(4), again we have found that Mr Chris-Kuye did not act towards Ms Bryan in a flirtatious manner. In saying that he would come to see her in one of the rooms she was cleaning, he was performing his management duties. Ms Bryan was perceived to be under-performing and he would check the rooms of under-performing staff. That conduct was not therefore unwanted conduct and was not in any event related to her sex.

46. As to 1(5), we have found that Mr Chris-Kuye did not wait for Ms Bryan to come into the 1 o'clock break meetings and then follow her in and make a point of speaking to her and another female colleague. Again therefore,

this allegation does not succeed, on the facts, was not unwanted conduct and was not related to her sex.

47. As to the allegation in 1(1), we note that Mr Chris-Kuye made the concession during his evidence that he would not use words to the effect of "I like you" again, as those words could clearly be misinterpreted. Bearing in mind our factual conclusions above, that the words were not in any event said in a flirtatious manner, for example by being whispered, we do not consider that the words used could reasonably be said to be unwanted. In any event, we find that they were not related to the claimant's sex. They were said because Mr Chris-Kuye noticed that she was nervous. We find that those words would have been said in similar circumstances to a male interviewee who appeared to be nervous. In any event, we conclude that those words were not said with the purpose of creating the prohibited effect and that the conduct alleged could not reasonably have had the prohibited effect.

48. As to the allegation set out at 1(6), we find in relation to this incident that it was related to sex. We find that such words would not have been said to a male colleague. It was said to two female colleagues, not to the male porter. We find that it was also unwanted conduct.

49. We also conclude, in relation to the words said, that it was not Mr Chris-Kuye's purpose, in saying those words, to bring about the prohibited effect.

50. The final question therefore is whether the conduct had the prohibited effect, considering Ms Bryan's perception, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect. We found the issues in relation to this incident finely balanced. Our conclusion is that Ms Bryan may have become overly sensitive, as a result of her incorrect perceptions of the behaviour of Mr Chris-Kuye towards her in general; we also take account of the fact that we have rejected Ms Bryan's evidence in relation to many of the other incidents which she alleges, and/or the context in which they took place. This was an isolated incident. We consider that the use of such words by a manager towards a junior member of staff was ill-advised. It cannot, in 2019, be dismissed as 'mere banter'. However, we have concluded, bearing in mind the other matters and all of the circumstances set out above, that it was not reasonable for the conduct to have the prohibited effect. This allegation does not therefore succeed.

51. As to the allegation in 1(7) above, we refer to our finding of fact regarding the perception of the claimant that the reason why Mr Chris-Kuye offered to buy ice-creams for the staff was because he was relieved that Ms Bryan had not complained about him. We found that such perception was wrong.

52. We conclude in relation to this incident, bearing in mind the context in which the particular words were used, as found above (it was a hot day), that the conduct was not related to sex. We accept Mr Chris-Kuye's evidence that he was not aware of the sexual (or for that matter racial) connotations of the word vanilla. That in itself does not mean that the words used, in certain contexts, could not be related to sex, whatever the intention of the person saying those words. We can see how in certain

contexts, the words “Sonia likes vanilla ice cream” could be related to sex. In the context of the conversation that took place on that day however, we conclude that the words used were not related to sex. Given that finding, we do not strictly speaking need to go onto consider the other two questions, of the purpose or of the effect of the words used. For the sake of completeness however, we do not conclude that the purpose of the words used was to create a hostile etc environment. Further, it was not reasonable for the words to have the prohibited effect, particularly bearing in mind the (incorrect) perception of Ms Bryan about why she thought Mr Chris-Kuye was buying ice creams for everyone.

53. As for the breach of contract claim, we find that in not paying the weeks’ pay in lieu of notice immediately following the dismissal of Ms Bryan, Travelodge acted in breach of contract. The payment was not made until about three months later. It was because of that breach of contract that Travelodge was obliged by HMRC to deduct tax and national insurance as a result of them having to apply an emergency tax code. Had her contract not been breached, there would have been no need to apply an emergency tax code and Ms Bryan would have received the full amount due to her. We therefore find for Ms Bryan in relation to this issue. She is owed £40.51.

54. In coming to our conclusions, we have considered the statutory burden of proof. In this particular case, it was not of any real assistance because we were able to make clear findings of fact, even where matters were finely balanced, and clear conclusions, as set out above. Had the burden of proof shifted, we would have been satisfied with the employer’s explanation, again for the reasons above.

55. We would like to make two concluding comments. First, in the midst of cross-examination, Mr Chris-Kuye suggested that the claimant was lying. It is easy to say such things in the heat of cross examination. Whilst we have found that in a number of respects, Ms Bryan appears to have reconstructed events after they have taken place, we are not in saying that suggesting that she has been a dishonest or untruthful witness. Memory is known to be unreliable, and in reconstructing matters after the event, witnesses can become convinced that their recollection is indeed correct. We consider that this is one of those cases.

56. As for Mr Chris-Kuye, he quite rightly conceded that using the words “I like you” in an interview could be misinterpreted. There are perhaps other lessons to be learned from the facts as found above, particularly in relation to the “smack me” comment.

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Employment Judge A James

Date_20 December 2019_____

JUDGMENT SENT TO THE PARTIES ON

.....20 December 2019.....

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FOR THE TRIBUNAL OFFICE

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