# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Bulgar

**Respondents:** 1. Career Makers Recruitment (UK) Limited
2. David Hicks
3. Scott Hewson

**Heard at:** Manchester **On:** 29 -31 October 2019
26 February 2020 (in chambers)

**Before:** Employment Judge Feeney

**REPRESENTATION:**

**Claimant:** Ms S Quinn, Solicitor
**Respondent:** Mr J Peel, Employment Consultant

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims of sexual harassment under Sections 26 (1) and (2) in respect of the email of 12 January succeed.

2. The claimant's other claims fail and are dismissed.

# REASONS

1. The claimant brings claims of discrimination following his dismissal by the respondents on 15 January 2019.

**Claimant's Submissions**

2. The claimant submitted that the reason for his dismissal prior to the end of his probationary period was because the second respondent had made a sexually inappropriate comment to him via text message that the second and the third respondent (a friend of the second respondent) were subsequently laughing about it and that the third respondent dismissed him in order to avoid

any difficulty over the comment in respect of which the claimant subsequently brought a grievance.

**First Respondent's Submissions**

3. The respondents submitted that they accept the second respondent made an inappropriate comment however there was no connection between that and the decision to terminate the claimant's employment, his employment was terminated because of poor performance.

**Second Respondent's Submissions**

4. The second respondent submitted that he had meant the text as a joke and that he had not told the third respondent about it. He denied he had discussed the matter with Scott Hewson and he had no involvement in the decision to terminate the claimant's employment.

**The Issues**

5. Section 13 Direct Discrimination

   (i) Did the dismissal occur due to the claimant's sex;

   (ii) Who was the appropriate actual or hypothetical comparator;

   (iii) Was the treatment of the claimant less favourable than how a hypothetical comparator would have been treated by the respondent;

6. Section 26 (1) and (2) Harassment.

   (1) Did the respondent engage in unwanted conduct towards the claimant by:-

      (a) The email from Mr Hicks on 13 January;

      (b) By Mr Hicks and Mr Hewson laughing about it on 13 January;

      (c) By dismissing the claimant.

7. If so, was any such conduct:-

   (a) Related to the claimant's sex; or

   (b) Of a sexual nature.

8. If so, did any such conduct have the purpose or effect of violating the claimant's dignity or did it create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

9. Was Mr Hicks acting in the course of his employment when he sent the email?

10. Sexual Harassment – Section 26(3)

    (i) Did Mr Hicks engage in unwanted conduct of a sexual nature or unwanted conduct relating to sex by sending the email on 13 January;

    (ii) Did that conduct have the purpose or effect referred to in Section 26(1)(b);

    (iii) Did the respondent because of the claimant's rejection of the conduct treat the claimant less favourably than the respondent would have treated the claimant if he had not rejected the conduct;

11. Victimisation

    (i) Did the claimant do a protected act as defined in Section 27(2) by:-

        (a) Telling Mr Hewson about the email and that he objected to it;

        (b) Telling Mr Hicks he was not happy about the email;

    (ii) Did the respondent dismiss the claimant because he did the protected act?

**Procedure**

12. Mr Hicks and Mr Hewson had both not submitted responses however judgment had not been given in default in relation to these claims in view of the nature of the allegations. Mr Hicks attended the hearing and asked to be included in the proceedings. It was agreed that whilst we were reading the bundle Mr Hicks would submit a late response and provide a witness statement. It was agreed he would be assisted by the respondent's representative, Mr Peel, in doing this.

13. Mr Hewson indicated that he did not intend to attend and he felt that he had not discriminated against the claimant.

**Witnesses**

14. For the claimant the claimant himself and the claimant's mother Miss Rachel Bulger (RB), For the respondent Mr Adam Kay (AK), Operations Manager and Mr David Hicks, Business Development Manager. There was an agreed bundle.

**Credibility**

15. We found the respondents' witnesses credible although there was some confusion in Mr Kaye statement, however he clarified the main mistake at the

beginning of his evidence. In particular Mr Hicks was a candid witness. The claimant was credible but had been confused over some dates and details which made us wary of accepting everything he said**.**

**Tribunal's findings of Fact**

16. The respondent is a recruitment agency separated into different departments depending on the type of work involved. There was a blue-collar section which related to for example construction industry recruitment and a white-collar section which referred to more administrative roles. The claimant was offered a position with the respondent as a Trainee Consultant in the blue collar section on the 13 July 2018 and began working for them on 18 July 2018. The third respondent was his immediate line manager and the second respondent was a manager in a different team, Mr Kaye was the overall Operations Manager.

17. There was a discussion about the claimant's work on 6 November between Mr Patrick Zahoor, a director, and the third respondent where it was noted that the third respondent had told the claimant to keep on top of his desk "It does seem like he is doing this, I will keep doing random spot checks to make sure this is happening". Therefore, the third respondent was keeping an eye on the claimant from this point and it accordingly indicates a prior concern regarding the claimant's performance. An action plan was put in place by the third respondent following the 6 November discussion with Patrick Zahoor.

18. On 13 November also, there was an email to several members of staff about the fact that there was a new start time of 7:50 am and that a number of staff had already been late once, including the claimant but not solely the claimant.

19. Mr Kay gave evidence that he spoke to the third respondent regularly about the team including the claimant and Mr Kay observed that the claimant was very quiet and was not really improving his phone calls pitching for work to the level they had expected. He seemed to be shy and a bit quiet. Mr Kay agreed that the results of the team as a whole were not good and accordingly the third respondent was under pressure to improve this. Mr Kay's view was that the claimant was predominantly at the bottom of the list of activity although he was not the bottom.

20. On 6 December an email was sent from the third respondent to the claimant complaining that he had not chased up a lead from the second respondent quickly enough, he was told to "please follow up all leads passed to yourself in future". The claimant replied that he was going to do this lead in the afternoon as he had got another task in the morning given to him by the third respondent i.e. to ring as many companies in general as possible.

21. On 12 December the third respondent sent a table out to all his team setting out each consultant's forecast and what they actually achieved. The claimant's forecast was eight and he achieved seven, the other members of his team had much higher forecasts and had not fallen too short, in two cases

including the claimants, it was because a candidate had not turned up for the job.

22. On 13 December the third respondent again emailed all his team, in effect complaining that they had not made enough calls that day, the claimant had only made two but another member of staff had only made one.

23. Commission was recorded in an email of the 17 December which showed the claimant and another member of staff on quite low amounts, the other member of staff was Sam another new member of staff**.** The third respondent also emailed the claimant on 2 January about some administrative mistakes he had made.

24. There was a complaint about the claimant on 3 January stating that the claimant had cancelled backup before the candidate was confirmed on site, the respondents had a process whereby they would have a preferred candidate who they gave the job to but they would have a back-up candidate in case the first one did not arrive and they were not supposed to cancel the back-up candidate until the client confirmed the first candidate had arrived. The claimant was criticised for cancelling the back up when the first candidate had confirmed he was on his way as that should not have been done until the client had confirmed the person was on site.

25. On 3 January Scott Hewson wrote to the claimant and said "as discussed in our meeting this afternoon your six-month probation is due in three weeks' time. We sat together and discussed the attached performance review to make sure you are achieving the goals you set out when you joined Career Makers Limited. Please keep a copy of this as we will be sitting together for your probationary meeting at the end of January, it is now your responsibility to make sure your performance meets the criteria requested". It was stated that the claimant had billed £4,500 when the billing expectations for someone with six months service (which the claimant was still just under at that point) was £4,800 per month. He was offered any further support or additional training to help him meet the expectation of £4,800. The fact the claimant was put on a performance review is indicative there were palpable concerns regarding his performance.

26. On 3 January Adam Kay emailed the claimant, it was headed "Jake – PIP review" and stated, "get your head down smash it mate you need to be flying by the time the review comes". Mr Kay explained that some of his comments were designed to encourage the claimant to meet his targets following the claimant in effect being placed on a performance improvement plan. and were not made because he thought the claimant was a good performer.

27. On 4 January Adam Kay emailed Scott Hewson and said the following:

> "Hi Scott
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> I have been listening to Jake on the phone from my desk and he is not good at all. Apart from the fact he makes a call every ten to fifteen

> minutes it is just along the lines of "just wondering if you needed one at the minute" followed by "no worries then I will give you a call in a couple of weeks". No open questions, no qualification with exploratory questions about the business and site, up and coming sites, how many agencies they used, what they used, what they struggle with when they need someone etc, he needs to seriously change or be replaced, he should be able to carry a sales call by now".

28. We find that this further indicated that there were serious concerns about the claimant at this stage. An email was also sent to the team on 4 January with highlighted how terrible the whole team were; however, the claimant had done particularly badly compared to the others. Adam Kay also sent an email round to the managers on the same day complaining about how bad the calls were in construction.

29. On 4 January the third respondent wrote to Mr Kay regarding the claimant as follows:-

> "Hi Adam
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> As you know I conducted a PIP review with him yesterday. I am going to take him and CP with me today for sales training as they are the weakest people in my team at the moment, CP is new so needs time but the volume they are putting out is my concern at the moment. I will act on this immediately, I also have adverts out on social media etc for Consultant and Sub-Managers. I don't know if you have noticed so far but I am extremely focussed and will not be carrying anybody in my department this year in any way, that much I can guarantee you".

30. The third respondent had also emailed Adam Kay the same day additionally describing most of his team as lazy and advising that he thought that SC was the next best person, that he was interviewing for new staff, and advised that he got three to four interviews booked in next week. He was advised by AK that the construction team was running at a loss and it was not worth them having it as it was, it could be run just by the third respondent.

31. The third respondent also emailed the claimant the same day and stated that his phone calls were not long enough, that he would not get results from a phone calls of 1 minutes and 27 seconds. It was clear he had done some careful analysis of the claimant's activity that day.

32. A training course was taking place in January on 8, 9 or 10 and the claimant advised that he cancelled a day off in order to attend this and he felt this showed his commitment to the job.

33. On 10 January the third respondent emailed the claimant again (he was copying all these emails to Adam Kay, his manager) it was headed "this morning's issue". This said:-

> "Hi Jake

> Following on from this morning I need you to understand that I expect you to deal with these situations yourself moving forwards. You have been with us long enough to know your role, I have even highlighted that in your review meeting recently attached and told you that I expect you to demonstrate that you can manage the resourcing process from start to finish, this morning the below candidate was asked to leave site as two labourers turned up for the same position for AAC, when I asked you about this and for an explanation you told me you had not had any contact with either temp and had left it with Emily, you know better than that, this is the reason I have felt the need to have a chat with you as an escalation from our last meeting. Please be conscious of the attached review form ahead of your probation meeting because I need you to be self-sufficient in your role, possibly moving forwards. Please do you best today to find a position for the operative below as it is our fault he was not in work due to this morning's issues. I expect to see a high volume of calls to DB/prospect clients around Sheffield today on your log, if you need any help please let me know that is what I am here for".

34. There was a one to one between AK and the third respondent on, according to AK in his witness statement, 10 January which included discussion about the claimant. However, the discussion was confirmed in an email, as this was described as a record of the 121, was dated the 11th January and referred to "thanks for today" we find this meeting took place on 11th January.

> The email said
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> " J – one-week target to hit or leave final shot, keep it realistic but tough he has to push and he has to achieve". It also criticised other members of staff for example Roxanne and Sam. In respect of Roxanne it was said 'become a big hitter or leave' The time of the email was 16.39. The claimant disputed that this email was genuine, he pointed out that it was not produced when he made a subject access request (SAR) and a request to inspect the original was refused. However, we accept it was genuine if the respondent had wanted to manufacture it they would not have said that the claimant had one week to improve as this was inconsistent with the actual dismissal of the claimant which was before the expiry of the week.

35. Mr Kay's evidence was that he had a further discussion with the third respondent the next day, 11 January, where he said he was going to let Jake go as he felt there was no improvement and there were errors. Mr Kay said that this was fine if that is what Scott wanted to do. However, this does not fit with the meeting being on 11 January and as it was a Friday there could have been no meeting on 12 January. As AK was not cross examined or re-examined about this we can take it no further other than to say we cannot accept this conversation took place due to the discrepancy on the dates and the lack of additional information to clarify it.

36. It does not appear that the third respondent ever advised the claimant he had only one week to prove himself. The tenor of the comments on the 11 January suggested that the individuals were supposed to be spoken to advise them of the decisions made.

37. However, we accept that from the email that at best the claimant had a week left to prove himself however not that a decision had been made before the weekend of 12/13 January to dismiss the claimant.

38. It was clear however that the third respondent was under a lot of pressure to improve the team's performance and profit. In fact, the third respondent himself was to have a review meeting with AK on 18th January.

39. The claimant's evidence was that around 1.00am on Saturday 13 January he received a work email from the second respondent which he saw on his phone. However, it was later clarified that this must be 12 January and he did not see it until the morning. The claimant was further confused as will be seen from his later emails to the first respondent where he referred to Sunday as the day he saw the text.

40. In a subsequent second supplemental statement, the claimant clarified that he understood that the second respondent was on a works do on 11 January celebrating a contract win. He (the claimant) was not out with them. The email stated, "do you fancy some strange I won't tell if you don't our dirty little story", but that the claimant did not open that email until the following morning around 8.00am i.e. Saturday 12 January. The claimant gathered it was something sexual and googled an urban dictionary to find out that it meant sex outside a current relationship, the claimant was with his girlfriend at the time and showed it to her. He also showed it to his mother who advised him to deal with it when he was in work on Monday. Therefore, the claimant's ultimate evidence was that he saw the message on Saturday. He then replied on Monday to the second respondent on 14 January saying, "bit much this Dave make sure it's about work when you are speaking to me in future".

41. The second respondent suggested that what he said was a joke and banter and meant nothing by it, however we do not accept that, we think he was attempting to obtain something from the claimant and was putting out feelers.

42. The second respondent's evidence was that when he received the email from the claimant on Monday 14 January he went over and apologised and said, "Drunk Dave is a knob head" and that later in the morning he said when he was stood with Scott Hewson they were laughing about the videos that they had sent each other singing from that Friday and that he never mentioned to Scott Hewson the email to the claimant or the claimant's response.

43. In the claimant's second witness statement he said that the second respondent had said drunk Dave is a "knob head", however he also stated that the third respondent made a comment about the email although he could not remember exactly what it was and that the claimant said, "what, do you know?" and that the third respondent replied, "Of course I do". The second

respondent completely denied this and as recounted above stated that they were laughing about something else. The claimant also says he rung his mother RB stating that they had been laughing about the email. RB agrees he related the "knob head" comment and that "he felt his managers were laughing at him", however her version of the incident did nothing to actually corroborate the detail of the claimant's version. Further there was nothing in the claimant's account that on the balance of probabilities established they had been laughing at the email to the claimant rather than the videos the second respondent referred to.

44. The claimant made a slightly different statement in his ET1 stating that he made it clear to R3 whose desk was opposite to his, and was present at the time of R2 coming over to speak to the claimant, that he was not happy about receiving the email. C said had found R2 and R3 laughing about the email together and R3 told C that R2 had made him aware of the email straight after R2 had sent it to C. However, this is not the evidence he gave in his witness statement.

45. AK stated in his witness statement that he and the third respondent had a further conversation on 14th January in the morning before 8 am when the latter said he was 'letting Jake go that day' and AK advised him it would be better to do it sooner rather than later. AK before giving his evidence confirmed that it was the 15 January not the 14 January. AK said later in the day after the dismissal he had a conversation with the third respondent about the return of the claimant's mobile phone**.**

46. On 15 January the claimant's employment was terminated by the third respondent. The third respondent told the claimant it had 'come from above'. Whilst AK had indicated that the claimant should be given a week to improve he had actually been terminated only on the second day into this week. However, he had approved the third respondent's decision to dismiss the claimant earlier in the day**.**

47. Following his dismissal, the claimant emailed Mr Zahoor, Mr Akram (another director) and Mr Kay on the same day stating "I am emailing you with regards to the termination of my employment on the grounds of my performance, I have checked my contract which states there is a procedure in which any dismissal on these grounds should be followed … I have witnessed other people in the company being taken through this procedure and given a chance to improve before being dismissed. I feel I have been treated unfairly … I do however feel that the incident involving Dave Hicks in which he sent me a vile disgusting and offensive sexual email from your system at 1 am on Sunday morning has played a part in your reasons for my dismissal. Dave was openly laughing about it on Monday at a desk with myself and Scott Hewson which at the time made me feel very uncomfortable and humiliated. As we know Dave is one of the company's top billers and it would be a lot easy for the company to let me go than cause any friction with Dave".

48. Mr Kaye replied saying that he was shocked to read this email and about the message and confirmed that the whole of the senior management team were

unaware of this when the decision was made to terminate his employment. It was not connected in any way but if the claimant wanted to make a complaint they would investigate it.

49. The claimant replied on 16 January saying "I received this email at 1 am on Sunday morning, the contents are obviously of a sexual nature, when I arrived at work on Monday I emailed Dave Hicks and stated that the email was a bit much and to only speak to me about work in the future, within five minutes Dave was at my desk sat next to Scott Hewson. Dave apologised but both he and Scott were openly laughing about the email. Scott then stated that Dave had told him about the email right after he had sent it, as you can see the email in my opinion is a form of sexual harassment and for my team manager Dave to openly laugh about it in front of me is also harassment, and completely gone against by dignity in the workplace.

50. The respondent then dealt with the matter as a grievance but the claimant understandably stated that he would not be attending any grievance meeting. The grievance hearing was arranged for 23rd January.

51. AK said in his witness statement that he had spoken to SH after the email and he had denied that he knew anything about the email message from the second respondent, nor had it been mentioned when he had dismissed the claimant. He did not ask him specifically if he had dismissed the claimant to protect the second respondent but then that is understandable if he accepted his word regarding the email message. AK said he investigated the matter but there were no interview notes and AK had not mentioned this in his witness statement

52. In an interview with the company the second respondent stated that it was just banter and that he had never discussed it with Scott specifically although he had a chat with Scott about the events of the weekend in general but did not mention Jake or the message, that he had experienced Jake taking banter on other occasions so he was not expecting him to react badly to it, and he offered to resign however when the company stated that wouldn't be necessary. The company gave the second respondent a first and final written warning on the 4 March. They took the view it was an out of hours personal issue. The claimant however pointed out that any documented activity regarding his complaint only occurred after he began the tribunal process.

53. The claimant introduced evidence that other poor performers had either not been dismissed or had been taken through a procedure. In respect of an A Khan the first respondent said he was disciplined for lateness but this was a minor issue compared to bringing in work/clients which was the claimant's problem. In addition, he worked in the white-collar team which deals with permanent jobs and therefore employees on that team are given longer to prove themselves as the process is longer. He was on a PIP and resigned prior to his PIP review date. In addition, Roxanne was referred to who had also been cited as a poor performer in the 11th January email, AK said she had responded to her PIP, she had been with them longer, she had had a

disciplinary and improved and she was now one of their best performers – ot was a temporary 'blip' for her and could not be compared to the claimant. Regarding Sam his performance was not as bad as the claimant's.

54. Of further relevance the claimant stated when he was appointed he was told that he would be required to respond to email messages 24/7 and that therefore when that message was sent to him, not only was it from a works email to a works email address, but he was required to look at it as it could possibly be an urgent call from a client wanting somebody for Monday morning.

55. The respondent denied that the claimant had been told this and stated there was no such requirement, whilst AK said in evidence there was no instruction to be available 24/7 he agreed in cross examination that staff would have to answer calls at the weekend and in the evenings.

56. The claimant also referred to his SAR request and compared the documents disclosed in these proceedings which were far more extensive, AK who had dealt with the request said it was because he had no experience of such requests and originally thought everything had been disclosed. He was asked why the respondent had refused to allow an inspection of the original email however AK did not know as it was dealt with by the respondent's directors.

**The Law**

Section 13

57. Section 13 of the Equality Act concerns direct discrimination and says as follows:-

(i) 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

(ii) In a considerable body of case law on direct discrimination currently the approach is to consider what the reason was for the treatment i.e. the reason why approach. In order to establish this, it is often relevant for the claimant to designate a comparator and to show that the comparator would have been treated more favourably, whether a real comparator or a hypothetical comparator. The Tribunal must also look at the operative or effective cause of the discrimination which requires consideration not only of why the discriminator acted as he did, but whether there was any conscious or unconscious motivation related to discrimination.

(iii) In order to establish a prime facie case of discrimination. In addition, a claimant may ask the Tribunal to draw inferences from other matters of some relevance as there will rarely be evidence of direct discrimination.

58. The authority for the reason why approach is Shamoon -v- Chief Constable of The Royal Ulster Constabulary 2003 House of Lords.

59. For the purposes of direct discrimination Section 23 of the Equality Act 2010 provides that on a comparative case there must be no material difference between the circumstances relating to each case, in other words the relevant circumstances of the complainant and the comparator must be the same or not materially different.

**Section 26 Harassment**

60. Section 26 Harassment

(i) 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.

(ii) A also harasses B if

a. A engages in unwanted conduct of a sexual nature; and

b. The purpose has the conduct or effect referred to in subsection (1)(b)

(iii) A also harasses B if:

a. A or another person engages in unwanted conduct or a sexual nature or that is related to gender reassignment or sex;

b. The conduct has the purpose or effect referred to in subsection1(b) and

c. 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.

(iv) In deciding whether conduct has the effect referred to in sub section 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.

61. Does the test contain both subjective and objective elements, conduct is not to be treated as having the effects set out in Section 26(1)(b) just because the complainant thinks it does, the Tribunal is required to take into account the claimant's perception, the other circumstances of the case and whether it is conduct which could reasonably be considered to have that effect.

62. In Richmond and Fermiology -v- Dalliwell 2009 the EAT held the Tribunal should address three elements in a claim of harassment. First there was unwanted conduct, second did it have the purpose or effect of either violating dignity or creating an adverse environment. Third, was that conduct related to the claimant's protected characteristic. Five, in considering this point the EAT in Warby -v- Wunda Group Plc 2011 relied upon the judgments of the House of Lords in James -v- Nagarayan and held that the alleged discrimination must be considered in context. The EAT upheld the Tribunal's decision which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background.

**In the course of employment**

63. Section 109(1) of the Equality Act provides that an employer is liable for acts of discrimination and harassment and victimisation carried out by its employees in the course of employment. It says "anything done by a person (A) in the course of A's employment must be treated as also done by his employer". It does not matter whether the employer knows or approves of the action in question. The employer does have a defence where it can show it took all reasonable steps to prevent A from doing the discrimination however that was not relied on in this case.

64. Three things therefore must be established:-

(i) That at the relevant time there was an employment relationship between the employer and the alleged discriminator;

(ii) That the conduct occurred in the course of employment and;

(iii) The employer did not take all reasonable steps to prevent the conduct in question.

65. In the course of employment has a wide meaning including acts in the workplace and may extend to circumstances outside work such as work-related functions or business trips abroad, for example an employer could be liable for a discrimination which takes place during a social event organised by the employer, such as an after works drinks party. The definition and the advice is based on a number of cases, in Waters -v- Commission of Police for Metropolis 1997 Court of Appeal, it was decided that the allegations of sexual assault by a male colleague against a female Police Officer which took place in police accommodation was outside the course of employment. The parties

were off duty and the male officer was a visitor to the woman's room in a police section house. It was the same as if they had been social acquaintances with no working connection.

66. In the Chief Constable of Lancashire Police -v- Stubbs and Others 1993 EAT the EAT upheld the decision that acts of discrimination that took place at an after-work drinking session at a pub and at a college leaving do were in the course of employment. The EAT said the Employment Tribunal should exercise its judgment in this respect. Matters to consider are the person on duty, did the conduct occur on the employer's premises, were the social gatherings immediately after work or organised?

**Reasonable Steps Defence**

67. Under Section 109(4) Equality Act 2010 a respondent can defend a claim on the basis that, where employees are responsible for any discrimination, they took all reasonable steps to prevent the discrimination occurring.

68. However, whilst the first respondent initially indicated they were going to rely on this defence (although it had not been pleaded) in relation to the second and third respondent this was later withdrawn in relation to the second respondent

69. Further, no evidence was adduced on this point nor any submissions made. Accordingly, we have not addressed the issue in our conclusions.

**Burden of Proof in discrimination cases**

70. In Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide in the absence of any other explanation that a person A has contributed the provisions concerned the Tribunal must hold the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

71. The Tribunal must consider a two-stage process; however, the Tribunal should not divide hearings into two parts to correspond to those stages. The Tribunal will wish to hear all the evidence before deciding whether the requirements of the first stage are satisfied and if so, whether the respondent has discharged the onus that has shifted, see Igen Limited -v- Wong and Others Court of Appeal 2005.

**Victimisation**

72. In relation to victimisation a claimant has to establish:-

    a. That there was a protected act;

    b. That there was detrimental treatment;

c. That the detrimental treatment was because of the protected act.

73. A protected act is set out in section 27(1) of the Equality Act 2010 and includes:

(1) Bringing proceedings under the Equality Act;

(2) Giving evidence or information in connection with proceedings under the Equality Act;

(3) Doing any other thing for the purpose of or in connection with the Equality Act; and

(4) Making an allegation, whether or not express, that A or another person has contravened the Equality Act.

74. It can include things arising after the end of employment as well.

75. The definition states that:

"A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act; or

(b) A believes that B has done or may do a protected act."

**Conclusions**

**Factual issues and discussion**

76. Was the claimant dismissed because of his complaints about the email from the second respondent.

77. We accept that the second respondent had no involvement with the decision to dismiss the claimant.

78. In respect of the third respondent the first issue is did he have knowledge of the email and the dispute.? the claimant says he did and recounts the circumstances quite soon after his dismissal (email of 16 January) and also has some corroboration from RB

79. The second respondent says he did not tell the third respondent and they were laughing about something else. There is no evidence from the third respondent. However, AK says that the third respondent on 15 January denied to him he had seen it. As we found the second respondent a candid witness we have accepted his evidence supported as it is to some extent by AKs hearsay evidence and the fact the claimant produced different versions of what had happened. The second respondent also had no discussion with the third respondent about dismissing the claimant.

80. If the third respondent did know about the email we find the reason for the claimant's dismissal was still underperformance. We have taken into account that AK and the third respondent appeared to agree the claimant would have a week's grace and this was only three working days before the dismissal however the third respondent was under a great deal of pressure and even though we have not heard from him on the balance of probabilities it made sense to dismiss the claimant. Further we cannot really see how the issue over the email would have caused the third respondent to dismiss the claimant, it was inherently illogical when there was no suggestion the claimant was going to take it any further.

81. Regarding the claimant's submission that we should in effect draw inferences from the fact he was not the worst performer and that other people had been put through a procedure before being dismissed the respondents has established to our satisfaction that performance was the reason why the claimant was dismissed. The issue was that his performance was observed and he was not viewed as someone who could step up and start bringing in substantial amounts of work. Further, the respondent explained the difference between A Khan, Sam and Roxanne and the claimant's treatment. Regarding others they had longer service or in the case of Sam there had been less issues.

**Section 13 Direct Sex Discrimination**

82. The claimant argues that if he was female and R2 had emailed him in the same way that he would not have been dismissed and the respondents would have treated it more seriously.

83. We have found that the claimant was not dismissed for the email.

84. The fact that the respondents did not take any action for a while against the second respondent is not less favourable treatment of the claimant as the claimant had left by this stage. In any event rather than it being because the claimant was not a woman we accept the respondent's explanation that they thought it was not a work-related matter and no further action was needed because they accepted the dismissal was due to underperformance. They took action later after legal proceedings had started when they took legal advice.

**Section 26**

85. The claimant relies on two incidents:

    (i) The original email; and

    (ii) The discussion between R2 and R3 where they were laughing about it in the claimant's view.

Re (i)

86. We have no hesitation in finding that the email was of sexual nature, and it was degrading and humiliating and unwanted conduct. It therefore fulfils the criteria for Sections 26(1) and (2). Therefore, the only issue is whether it was in the course of employment.

Re (ii)

87. Regarding the discussion between R2 and R3. We have accepted the second respondent's evidence that he and the third respondent were not discussing the text message to the claimant but other videos they had sent each other and therefore there was nothing in this to come within the definition of harassment under Section 26.

**In the course of Employment**

88. We find that the text was sent within the course of employment. We accepted the claimant's evidence that employees were required to monitor their emails and respond as its highly likely that a client could well contact a member of staff over the weekend if they learnt that they suddenly had a vacancy due to illness or someone else had let them down and therefore they were required to monitor their phone for emails. Further, the second respondent used a works email account in addition he was also on an after-work drinks outing to celebrate a big win of a client, the combination of all these factors in our view establishes that the text was sent in the course of employment.

**Victimisation**

89. What were the protected acts the claimant relied on. The claimant relied on:-

(i) Telling the third respondent about the email and that he objected to it; and

(ii) Telling the second respondent, he was not happy about the email.

90. In relation to the first protected act we have found factually that he did not have a discussion with the third respondent about the email clearly setting out that he objected to it**.** He did so with the second respondent.

91. Regarding the second protected act, he did tell the second respondent in effect he was not happy about the email which is a protected act. The question then arises whether the claimant was dismissed for that protected act and we have already found he was not dismissed for that protected act. The second respondent had nothing to do with his dismissal so there was no causal connection between the protected act and the detriment of dismissal.

92. If we are wrong that the dismissal was unconnected to the sexual harassment we would find that the claimant would have been dismissed by 18 January, or at the latest at the end of his probationary period.

## Summary

93. The claimant's claim of sexual harassment by the second respondent on the 11/12 January 2019 succeeds however the claimant's other claims fail and are dismissed.

Employment Judge Feeney

Date: 3 March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 March 2020

FOR THE TRIBUNAL OFFICE

**Note**

**Public access to employment tribunal decisions**
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

[JE]