EMPLOYMENT TRIBUNALS

Claimant:	**Mr Andrew Weatherby**	
Respondent:	**Amcrol Limited**	
Heard at:	**Llandudno**	**On: 6, 7, 10, 11 February 2020**
Before:	**Employment Judge R Powell** **Members:** **Ms C O Peel** **Ms S D Atkinson**	
Representation:		
Claimant:	Mrs Weatherby	
Respondent:	Mr Nigel Bellis, Director	

JUDGMENT having been sent to the parties on 17 February 2020 and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Introduction

1. Mr. Weatherby, who I shall now refer to as the Claimant, has presented two claims to the Tribunal. The first relates to conduct which he alleges took place during his employment, the latter relates to his dismissal.

2. The Claimant asserts that he was subject to a course of harassment on the grounds of sex, sexual harassment or harassment related to sex by the conduct of a colleague who has not been a party to these proceedings nor a witness and to whom we will refer as CF. That conduct was through the media of text messages, whatsapp messages and emails sent between late May of 2018 and February of 2019. That claim is one contrary to Section 26(1) of the Equality Act 2010.

3.The Claimant also asserted that he was treated less favourably because of his gender, his comparator is CF. His case is that he was immediately suspended upon CF presenting a grievance against him whereas, CF was not immediately suspended after his grievance had been presented against her.

4.The second claim asserts that the claimant's dismissal, by reason of redundancy on the Respondent's case, was an act of victimisation and, in passing, he also made reference to the possibility that the decision may have been influenced by a complaint he had made to the Health and Safety Executive. When the claims were clarified before the Employment Judge Ward, and then Employment Judge Brace, the claims were solely centred on the Equality Act 2010 rather than the potential claim of whistle blowing under the Employment Rights Act 1996. In the absence of an application to amend the claim we have the agreed scope of the identified claims as the limit of our task in this case.

The evidence

5.To determine the claims, we heard from a number of witnesses. Firstly, the Claimant on his own behalf and he was cross-examined by Mr. Neil Bellis acting on behalf of the Respondent. We then heard from Mrs. Weatherby, the Claimant's wife, who was also cross-examined.

6.On behalf of the Respondent we heard from Mr. Ian Bellis the owner of the Respondent business, he was cross-examined by Mrs. Weatherby and we then also heard from Mr. Ian Taylor and from Mr. Terry Mitchell.

7.Mr. Taylor is the owner of a business which shares the premises of the Respondent, Mr. Terry Mitchell is an employee of the Respondent and was the Claimant's immediate supervisor.

8.We also considered two other witness statements, one from Mr. Ashford who is a person who was contracted as a Consultant to assist the Respondent's business and one from Mr. Pearson, whose role as an IT expert was to examine certain emails and form an opinion to which we shall refer.

Findings of fact

9.In our findings of fact, we are unanimous. We reminded ourselves that it lies upon the Claimant to establish a prima facie case i.e. the burden of proof rests upon him not upon the Respondent. We address other matters pertinent to the burden of proof, in particular Section 136 of the Equality Act 2010, subsequently.

10. The Respondent is a small employer. It is a business which produces cleaning solutions primarily for industry.

11. Mr. Ian Bellis is the owner and manager of the business; he employs Mr. Terry Mitchell to undertake the primary task of the production of the cleaning solutions.

12. The Claimant was employed as a Production Operative principally working to assist Mr. Mitchell with the preparation of orders, loading and unloading of wagons and such maintenance and cleaning as he might be asked to do. In the absence of Mr. Mitchell, he could undertake the mixing of the chemicals.

13. The other employee was CF, she was employed as an Administrator and joined the Respondent's business sometime after the Claimant had commenced his period of employment.

14. The Respondent's pleaded in its initial response at page 43 of the bundle that it had clear policies in relation to equality and matters of discrimination on sex equality, race equality and disability equality.

15. The contract of the Claimant, in either of its forms within the bundle, does not demonstrate that the Respondent had any "anti-discrimination" policies.

16. The contracts refer to a disciplinary code and do refer to equal opportunities but the policy is limited to this: "it is the policy of the company to promote equal opportunity employment for all employees regardless of sex, marital status, creed, colour, race or ethnic origins within such statutory limitations or as required or otherwise imposed by law". We noted inside the statutory reference in the contract refers to the Employment Protection (Consolidation) Act 1978 which ceased to be in force some years ago.

17. The relevant factual matrix in relation to the claim of sexual harassment commences in May 2018.

18. It is agreed between the parties that the Claimant and CF had a good working relationship. It is described as one which was very humorous and which sometimes distracted them from their work. The witness, Mr. Mitchell, indicated that there were occasions when the character of the conversation was touched with innuendo with "on the edge" references which led him, on occasion, to quietly suggest to the Claimant that he should "tone it down". Mr. Mitchell was also reasonably clear that it was CF who was leading some aspects of this behaviour.

19. We find that there was a strong friendship between them and their shared humour contained innuendo.

20. At some point in late May of 2018 CF informed the Claimant that she was homeless and was sleeping in her car in a car park. The Claimant offered to provide some assistance and gave her his personal telephone number so that she could contact the Claimant and his wife who would then pass on contacts they had with persons who might be able to rent a property to CF.

21. We first noted on page 112 in the bundle a text message which we accept was from CF and was sent to the Claimant stating *"means a lot, thanks you have been a rock. Sleeping in Asda car park how did I get here?"* There were then a series of texts on the same day, 26 May, which were innocuous; "*what are mates for".* To that message CF replied; "*I could repay you in kind LOL"* and inviting the Claimant to a drink after work. On the evidence before us the claimant did not reply.

22. The next message we refer is dated 4th June at 15:01. It was sent to the claimant by CF after he had not replied to a message, despite three earlier texts requesting such a response. CF wrote to him; *"I'm totally fuckable think of the fun"* and then went on in a similar vein with three other texts on the same day.

23. The response from the Claimant on the same day at 17:03 was: *"(CF) I'm flattered but I'm happily married and we're just workmates"* CF did not appear to accept that and then made a series of other suggestive invitations: *"we can make something work if you want to".*

24. On 7 June at 10:29 there were texts from CF as follows: *"come and let me tease you when Bellis out",* "Terry (this is Mr. Mitchell) *said about your wife, hope she's OK, lean on me"*, *"Come and fuck me and take your mind off it", "Taylor wants me but I want you"* (Taylor is a reference we take it to Mr. Ian Taylor).

25. On the 8th June CF sent the following messages: "Bellis fucking me right off this week I need you to occupy me". On 14th June CF wrote*: "have you said summat to Terry he's ogled me"*. Next, *"Taylor drooling over my tits, wish it was you"* to which the Claimant responded: *"Need to stop. Why do you think I don't go in the office? Leave me alone"*. CF responded; *"oh it's fucking fun and enjoy it. Bellis would have me, won't you XX"*. The Claimant responded; *" CF just stop ffs. … it's offensive and intimidating."*

26. We note that a number of those texts were sent during working hours and they clearly refer to the Respondent's work environment, employees of the Respondent and behaviours or invitations to the Claimant in working time.

27. The same character of messages carried on: *"sat here looking at Taylor and thinking of your cock in my mouth"*, *"is Terry in tomorrow? I need to come down there and fuck you"* and various other comments of a similar sort [page 115 of the bundle].

28. When the Claimant, failed to respond to CF's messages, for instance by 12 September CF's attitude had changed, she wrote; *"I can influence a lot of people and he will always believe me when I start crying"* to which the Claimant replied; *" CF you really need to stop this. I have banter so I don't want to embarrass you in work. It's getting beyond a joke and I will go to Ian"* to which CF responded; *"you need to remember I am a single crying mum and can make your life hell. I guarantee you go to Ian and you will end up with no job."*

29. On the same day the Claimant wrote; *" CF back off"* to which she replied; *"you ok? You don't look happy today"* and then invited the Claimant to go out for a drink with her. There are further comments and an image sent to which the CF said, after no response from the Claimant; *"if you keep on ignoring me, I will make your life hell. I just want you to want me."*

30. On 16 January the Claimant texted CF to say "I've spoken with Ian this morning and you need to back off" to which CF responded on 17th "oh fuck off it's just a bit of fun, Ian won't fucking act on what you say, he hates you and always looking for a way out from you".

31. CF made further comments; "Well he's back and not said anything. Fuck off in your cage and hide behind Terry" and lastly; "So much for your Bellis word. Not a mention, think again about fucking with me."

32. It is the Claimant's case, that around this time a series of emails were sent to his personal email address from an account which was believed to be operated by CF. The account name was "-- Hannigan --@gmail".

33. There has been a dispute between the parties as to who was the creator of that account and the author of the emails. It has been suggested by the Respondent that the account and the content was at some point influenced by either the Claimant or Mrs. Weatherby and in this context the Respondent has identified a series of interactions with the "Hannigan" account in February of 2019.

34. On 19 February at 18:55 the account in question was accessed and a person unknown added a "new recovery email". The email account chosen was the work account of CF; the account she used in her employment with the Respondent.

35. The next morning at 06:55, almost exactly 12 hours later, on the instruction of Mrs. Weatherby a person called Daniel Monk emailed Mrs. Weatherby attaching a screen shot of the personal information for the Google account in the name of Hannigan which identified that the password had last been changed on 31 May 2018 and that the recovery address of CF's work email was present on the personal information. He said in his email *"attached the information I've only been able to obtain. I will have to look into the IP address detail for you today but the location shown has been turned off so it's proving quite difficult. CF will know you've accessed the information; she will also be alerted to the Amcrol email address that the account security has been compromised. The only way to prevent further notifications must be to change the recovery email address and password internally but I guess this is your proof*."

36. At 7:00am an email was sent to CF's Amcrol email address stating that access had been made and that the Amcrol email address was "listed as your recovery email".

37. At 7:00am there was a report to the same recovery address of a new sign-in to the Hannigan account and at 09:28 it is likely that it was CF who, having received the "recovery email address" message, chose to "disconnect" her work address from the Hannigan address.

38. The Respondent's case is that the Claimant, or his wife, manipulated the Hannigan account to either affect the content or to create an evidence trail between CF's work account and the Hannigan account. We have read Mr. Pearson's statement which does not go quite so far, but our first concern is really whether or not the content of emails sent from the Hannigan account was the handywork of CF or of someone else. We note that CF denies the emails quite clearly in her grievance interview to which we will come.

39. We have noted that the only three persons who logically could have had knowledge of the facts which are stated in the Hannigan emails; Mr. and Mrs. Weatherby and CF.

40. We also noted that CF could, if she wished, albeit improperly, have accessed the personal contact details of the Claimant and thereby found his personal email address.

41. In our Judgment having seen Mr. and Mrs. Weatherby we have reached the following conclusions.

42. We do not think it is likely that they created the Hannigan email account or wrote the content of the emails sent from that account. We considered that both denied doing so and there was no direct evidence to contradict them. There was little need for them to concoct a false trail of messages when

they had a record of CF's text and whatsapp messages. The content of the emails is consistent with the subject matter and character of the language used in the whatsapp's and text messages which were undoubtedly sent by CF to Mr. Weatherby.

43. We think it is far more likely therefore that the Hannigan emails were sent by CF using an alias email.

44. It may have been that Monk altered the recovery address but we know the recovery address appears to have been changed *before* Monk's access to the Hennigan account. Even if Monk had changed the recovery address, that does not alter our judgment that CF was the author of the content of the emails which were sent some months before Monk's first contact with the Hennigan email account.

45. The content of the emails and whatsapp messages made Mrs. Weatherby their target.

46. For example, CF knew that Mrs. Weatherby was suffering from a significant medical problem which could cause her blindness In a whatsapp message to Mrs. Weatherby about CF sending pictures herself semi-naked to Mr. Weatherby , CF wrote: "*at least if you do lose your site* [sight] *you won't see what I'm sending" [159].*

47. CF's emails, sent to Mr. Weatherby's email account, included comments aimed at Mrs. Weatherby, such as:

    "go to bed tonight and think about us [CF and the claimant] fucking each other, he will be thinking the same :)."

48. On the 5th February, after Mrs. Weatherby had informed CF that the claimant had reported CF's conduct to Mr. Ian Bellis, CF messaged the claimant:

    "*Keep that freak from my door. told you I always win, Taylor is a Knob but he is wrapped round my finger you watch me turn on the tears and have the last say and because you wouldn't let me have you without that thing [a reference to Mrs. Weatherby] knowing about it. When the woman cries she always wins you will see … Best start searching on the job centre because you won't be there long now, couple of days and I can cry a river at the click of my fingers….Bellis and Taylor will be all over me with pity poor single mum."*

49. We then turn to the statutory test in the context of our findings about the of the various electronic messages sent by CF to the Claimant.

Harassment – the legal matrix

The relevant statutory provisions states:

(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)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

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

(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.

1. The proper interpretation of the relevant statutory provisions on harassment is explained in the following authorities:

Richmond Pharmacology v Dhaliwal [2009] IRLR 336

Grant v HM Land Registry & anor [2011] IRLR 748

General principles

2. The relevant principles derived from these authorities are as follows.

3. The prescribed elements of unlawful harassment are

    a. unwanted conduct;
    b. having the purpose or effect of either:
    c. violating the claimant's dignity; or
    or related to the prohibited grounds.

4. Although many cases will involve considerable overlap between those elements of harassment, it would normally be a 'healthy discipline' for tribunals to address each element separately and to ensure that factual findings are made in each regard (Dhaliwal).

5. When considering whether the conduct had the prescribed effect on the claimant, although the tribunal must consider objectively whether it was reasonable of the claimant to consider that the conduct had that requisite effect, the claimant's subjective perception of the conduct in question must also be considered.

6. In **Dhaliwal**, the EAT (Underhill P) said that:

> ” We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

7. The Court of Appeal echoed these sentiments in Grant v HM Land Registry & Anor [2011] IRLR 748 when it stated in relation to whether an effect could ‘amount to a violation of dignity’ or properly be described as ‘creating an intimidating, hostile, degrading, humiliating or offensive environment’ that:

> ‘Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

50. Turning to Section 26(1) & (2) of the Equality Act 2010 we first consider whether CF harassed the Claimant by engaging in prohibited conduct, in this case conduct of a sexual nature and unwanted conduct.

    (i) It is not disputed by the Respondent that the multiple texts from CF to the Claimant were overtly sexual. The content of many of the texts is unambiguous. We therefore find that there was conduct by CF

towards the Claimant which was of a sexual nature for the purpose of subsection (2).

(ii) Secondly, it is manifest that after the claimant rejected CF's advances she wrote in an offensive manner to Mrs. Weatherby and threatened the Claimant that she would cause him to lose his job with the respondent if he complained about her behaviour. We are satisfied that conduct was unwanted and related to the claimant's gender.

51. The Respondent strongly disputes that the conduct of CF was "unwanted" by the Claimant.

52. The Respondent relies on the evidence of Mr. Taylor, Mr. Mitchell and the evidence of Mr. Ian Bellis. To differing degrees each gave evidence that the Claimant's relationship with CF did not change until a dispute between Mrs. Weatherby and CF which took place on CF's doorstep on the 4th February 2019. The Respondent argues that the lack of any prior change in the relationship is evidence that CF's conduct was not unwanted and, in reality, to paraphrase the closing submission by the Respondent, the Claimant was pressed into objecting to CF's conduct by his wife.

53. We have noted that in Mr. Mitchell's witness statement he recalled a change in the relationship between the two earlier than February. We have noted in the text messages of CF that there are a few occasions where she indicated that the Claimant was not coming to visit her anymore and we noted there were periods when there were no messages exchanged between them.

54. We have had the opportunity to see the prompt private responses by the Claimant objecting to CF's messages, and expressing that he was intimidated by CF's messages, and we have heard his evidence before the Tribunal.

55. In respect of Mr. Taylor's evidence, we found that less than convincing.

56. We think it is more likely than not that insofar as descriptions of the relationship between the Claimant and CF are concerned, that the character of the relationship altered from that which we described earlier around the time that the Claimant was expressly stating he wanted CF to stop and manifestly so by the time that CF began threatening the Claimant that she could persuade Mr. Ian Bellis or Mr. Taylor that she was the victim and how they would respond; it would be the Claimant's job that would be at risk.

57. We therefore find that CF's conduct was unwanted by the Claimant.

58. The next consideration is whether or not we objectively consider CF's conduct to be intimidating, hostile, degrading or humiliating. We have no doubt that the sustained unwelcome comments that were addressed in the various message formats are clearly unwelcome and they did intimidate the Claimant.

59. The next matter then is this, that there are two other issues which the Respondent puts forward. The first is that for a claim to succeed before the Employment Tribunal it must be one which falls within the remit of Section 109 of the Equality Act which, to use the simple parts here, is one which was "within the workplace".

60. The Respondent has highlighted the case of Forbes -v- LHR Airport Limited which was an Employment Appeal Tribunal case before Mr. Justice Choudhry, President of the Employment Appeal Tribunal, heard on 1 November 2019. The particular facts of a case in the Tribunal or EAT are rarely the determining consideration but what the Judgment does is set out the history of the relevant case law going back to Jones -v- Tower Boot Company Limited *[*1997], Waters -v- Commissioner of Police Metropolis and particularly the well-known case of Sidu -v- Aerospace Composite Technology Limited [2000] IRLR 602.

61. For instance in the *Sidu* case, the action had taken place on a day out to a theme park where Mr. Sidu had been racially insulted by a colleague, but the event was outside of the Respondent's working hours, everyone was present there by choice and the majority of participants were family and friends rather than employees.

62. In our judgment, it is clear that a substantial part of the CF's unwanted conduct took occurred in workplace. There are express references to invitations as to how the Claimant should act towards CF in the workplace and when he should do so. CF's threats relating to how the Claimant would be treated if he did not reciprocate, or if he complained to Mr. Ian Bellis. were assertions of how she would behave at work to persuade Mr. Bellis to dismiss the claimant.

63. We accept that there were a number of communications which were outside the work environment, for instance the communications between CF and Mrs. Weatherby, nevertheless some of them related to the Claimant's employment and, in our judgment, others were a response to the Claimant's rejection of CF's advances. The evidence in our Judgment is unambiguous that the two employees in work time and in the work, context were communicating and CF's communications were acts of harassment.

64. The last point that the Respondent relies upon is that of "the statutory defence" set out in section 109(4) of the Equality Act 2010:

"In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a)from doing that thing, or

(b)from doing anything of that description."

65. We note the respondent did not plead this defence and it is not a matter which the Claimant had an opportunity to address in evidence.

66. The Respondent asserts that it had fulfilled the statutory test of taking all reasonable steps to prevent an act of harassment by:

(1) Having a policy whereby any employee could approach Mr. Bellis, and
(2) Having a refence in the contract to an Equal Opportunities policy and
(3) That it was implicit within the Disciplinary Rules and Procedures, for instance pages 101-102 of the bundle, that discrimination would be treated as a disciplinary offence.

67. The Respondent's disciplinary rules make no express reference to discrimination or harassment which is somewhat surprising even for a small employer in this day and age. In this respect the respondent had not taken all reasonable steps to prevent discriminatory behaviour.

68. Secondly, there is no evidence of any induction or training for staff which alerted them to their responsibilities to behave in a non-discriminatory fashion or that any staff were aware of any particular policy other than that which is in their contract.

69. That an employee can come and speak to the manager is clearly a relevant consideration but it is insufficient to demonstrate that the respondent had taken all reasonable steps, even for a small company.

70. By reason of the above we firstly reject the respondent's assertion of the statutory defence because it was not a matter that was pleaded, noted as an issue or raised in cross examination.

71. Further, if we were wrong in that, applying the dicta in Canniffe v East Riding of Yorkshire Council [2000] IRLR 555 EAT, we find that the Respondent had not taken all reasonable steps to prevent CF's conduct.

72. We therefore find that the allegations of sexual harassment contrary to Section 26 of the Equality Act 2010 are well founded and upheld.

Direct Discrimination

73. The second allegation is one of direct discrimination. The character of that discrimination relates to the suspension of the Claimant. He asserts that CF was not suspended for five days following his complaints against her whilst he was suspended the day after her complaints were made against him. This he argues amounts to less favourable treatment because of his gender.

The Legal matrix

74. Section13 of the Equality Act 2010 states:

(1)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.

75. In some cases of alleged direct discrimination, the discrimination alleged is inherent in the act complained of and there will be no need to enquire further into the mental process, conscious or unconscious, of the alleged discriminator (see Amnesty International v Ahmed [2009] ICR 1450. In other cases, discrimination is not inherent but the act complained of may be discriminatory by reason of the motivation, conscious or unconscious, of the alleged discriminator. Nagarajan v London Regional Transport [1999] IRLR 572.

76. In the latter class of cases the Employment Tribunal asks itself what the reason for the alleged discriminator's act was, and if the reason is that he possessed the protected characteristic, then direct discrimination is made out. As Lord Nicholls has pointed out in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL at paragraph 10 of his speech, the answer to the question what the reason was for the treatment, also answers the question whether a Claimant was treated less favourably than was or would have been another person in the same position as the Claimant but who does not possess the protected characteristic.

77. In neither case is a benign motive relevant; nor is it relevant whether the alleged discriminator thought the reason for his or her treatment of the person with the protected characteristic, was that characteristic; see Nagarajan at paragraph 17 in the speech of Lord Nicholls, where he said this:

> "17. I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough

> investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of s.1(1)(a). The employer treated the complainant less favourably on racial grounds. Such conduct also falls within the purpose of the legislation. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination. Balcombe LJ adverted to an instance of this in *West Midlands Passenger Transport Executive v Singh* [1988] IRLR 186, 188. He said that a high rate of failure to achieve promotion by members of a particular racial group may indicate that 'the real reason for refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions' about members of the group."

78. The statutory reversal of the ordinary burden of proof dictates the evidential steps in the required chain of reasoning in an Employment Tribunal; see section 136 of the Equality Act 2010, subsections (2) and (3) of which provide as follows:

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

79. It is good practice for an Employment Tribunal to follow the two-stage process there set out. However, failure to arrive at its decision by following both the first and second steps in that two-stage process is not necessarily an error of law. There are cases in which it is unnecessary to follow the two-stage approach: see Mummery LJ in Brown v London Borough of Croydon [2007] IRLR 259:

> "38. The essential primary facts in the case were not in dispute apart from whether Mr Johnston made the '"not fitting in" remark' on which the tribunal accepted the evidence of Mr Johnston that he had not said that. Apart from that point the focus was on the reason for the treatment and it was therefore natural to move from the evidence as to a prima facie case of discrimination to the explanation of the council and Mr Johnston at the second stage. On that issue the tribunal accepted the non-discriminatory explanations given by the council and by Mr Johnston that Mr Brown's race was not the ground and therefore concluded that the council and Mr Johnston had proved that there was no discrimination on the ground of race.

> 39. This approach to the burden of proof is consistent with the approach laid down by the House of Lords in *Shamoon* to the substantive issues of less favourable treatment and to 'the reason why' question posed by less favourable treatment.
>
> **...**
>
> 41. In general it is good practice to apply the two-stage test and to require the claimant to establish a prima facie case of discrimination before looking to adequacy of the respondent's explanation for the offending treatment. But there are cases, of which this is one, in which the claimant has not been prejudiced in matters of proof of discrimination by the tribunal omitting express consideration of the first stage of the test, moving straight to the second stage of the test and concluding that the respondent has discharged the burden on him under the second stage of the test by proving that the offending treatment was not on the proscribed ground."

80. The Tribunal cautioned itself that unreasonable behaviour does not necessarily evidence discriminatory behaviour; Law Society v Bahl [2003] IRLR 640.

Facts relevant to the claim of direct discrimination

81. On or about 8th February 2019 the Claimant made an oral complaint to Mr. Ian Bellis about the way he had been treated by CF in the previous year.

82. On 12 February Mr. Bellis spoke to CF. We take that date from Mr. Bellis' typed answers for the grievance investigation at page 193. He informed her of the character of verbal complaint from the Claimant and, given the content of the penultimate paragraph of her own grievance [136] Mr. Bellis showed CF at least one of the emails from the "Hannigan" email account.

83. There is a disagreement between the Claimant and Mr. Bellis as to whether or not the Claimant submitted a formal grievance on the 15th February. The dispute here is of some importance.

84. The Respondent's case is that a letter put before the Tribunal dated 15th February [131], which summarises in brief terms the character of the Claimant's case, is one which was never received.

85. The Respondent's cross-examination challenged the Claimant about where the grievance had been delivered and points out in its submissions that the Claimant gave two different accounts of the location in the Respondent's premises.

86. It was noted that there was no documentary proof as to when the document was created, there was no witness to the delivery and that Mr. Ian Bellis' denies that the 15 February 2019 letter was received.

87. This is a theme that has occurred in the cross-examination of the Claimant when related to earlier oral disclosures of his concerns which again, Mr. Ian Bellis is adamant were not communicated.

88. We have noted in the text messages that passed between Terry Mitchell and the Claimant, that on 15 February 2019 the Claimant stated he had handed a grievance letter to Mr. Bellis [132]. Mr. Mitchell writes; "*have you given the letter to Bellis?"* to which the Claimant replies; "*Yes. About lunc [lunchtime] but given what I have put, he has left me here with her and gone out!"* to which Mr. Mitchell replied; "*well no shock there, you've rocked the boat. He won't want to deal with it."*

89. We also noted in texts between Mr. Mitchell and the Claimant in September 2018 relating to the Claimant's contemporaneous assertion that he had spoken to Mr. Ian Bellis about CF's behaviour.

90. It was put in cross-examination to the Claimant that his evidence was inconsistent, as to whether he had made one or two prior oral complaints and that he was inconsistent about the dates. It was put to the Claimant in cross-examination that he was simply falsifying the statement that he had handed in a written grievance on 15thFebruary.

91. There is no reasonable doubt that the Claimant sent text messages to Mr. Mitchell which indicated he had spoken to Mr. Ian Bellis about CF's behaviour in September 2018 [126].

92. Unless the Claimant manufactured the content of those text messages in September 2018 and the 15 February 2019 i.e. he made statements which he knew to be untrue, possibly for evidence upon which he could rely at a subsequent grievance hearing or Tribunal proceedings, it seems to us more likely than not that what he set out contemporaneously, is likely to be true.

93. It is apparent from Mr. Mitchell's text on 15th Feb that he was aware of the Claimant's intention to hand over a letter on the 15th February and the character of the dispute between CF and Mrs. Weatherby [158-162] had escalated to such a state by the 5th February that we find it highly likely that Mr. Weatherby submitted the letter of the 15th.

94. We have a number of concerns about Mr. Ian Bellis' evidence. On upon the balance of probabilities, with the burden resting upon the Claimant, we prefer the Claimant's evidence to that of Mr. Ian Bellis and we accept that he presented a written grievance to the respondent on 15 February 2019.

95. On 18 February CF submitted a formal grievance at 15:45 and an hour later [page 138] an external HR advisor, "Wurkplace", had provided advice to Mr Bellis to suspend the Claimant. Mr Bellis suspended the claimant.

96. On 19th February the Claimant, supported by his wife, presented two further documents which were treated by Mr Ian Bellis as a formal written grievance and CF was suspended on 20th. The Claimant's grievance was very critical of Mr Bellis' handling of the Claimant's prior oral and written concerns about CF's behaviour.

97. The Claimant's case is that he was suspended within 24 hours of a written complaint against him and his comparator, CF was not suspended until five days after the respondent received his written complaint.

98. The Respondent's case is that both were suspended the day after receipt of the respective written complaints against them and therefore the Claimant has not suffered less favourable treatment.

99. We have preferred the evidence of the Claimant with regard to 15th February 2019 written grievance. We therefore find that there is a difference in treatment between CF who was not suspended shortly after the written complaint and the speed with which the Claimant was suspended.

100. In addition to the point above, the Respondent's argued that the complaint from CF was one of sexual assault and it was perhaps, although not expressly stated, one of greater gravity.

101. We note that CF was suspended immediately after the grievance received on 19th and we noted that, but for her resignation, the conduct of sexual harassment alleged against her warranted gross misconduct proceedings [234]. We are not persuaded that the gravity of the offence was substantially different between that which was stated by the Claimant; of a sustained period of sexual harassment and that which was stated by CF.

102. In light of our rejection of the respondent's evidence we turned to consider whether the evidence before us was sufficient for the claimant to establish a prima facie case and "shift" the burden of proof to the Respondent under Section 136 of the Equality Act 2010.

103. We are satisfied that CF's complaint was in materially similar circumstances to that of the claimant for the purposes of section 23(1) of the Equality Act 2010 and the respondent's decision to suspend the claimant immediately upon receipt CF's grievance was less favourable treatment.

104. We have concluded that claimant's argument; that Mr. Ian Bellis, perhaps unconsciously, considered a complaint by a fifty year old man, that he was being harassed to have a sexual relationship by a woman many years his junior, was less credible or urgent than a similar complaint from a woman

could prima facie lead a tribunal to conclude that the claim was proven. That is so when, on CF's account to grievance investigation [188] Mr. Bellis had told her on the 12th February that: "Ian said that Andy didn't want to take the complaint any further."

105. We are satisfied that the claimant has established a prima facie case and, in light of our rejection of the respondent's explanations for the less favourable treatment it has failed to discharge the burden upon it to establish that the conduct was in no way whatsoever tainted by conscious or unconscious discrimination we have concluded that the claim of direct discrimination is well founded and succeeds.

106. There was a further assertion made in submissions on behalf of the Claimant regarding the provision of the offer of provision of support for CF but one which was not made to the Claimant.

107. We have determined as follows: This claim was not pleaded and we therefore do not consider it is within our jurisdiction to consider it, but if we were wrong in that, we note that the correspondence upon which the Claimant relies for this claim is limited to advice from the third party that CF *should be* offered support. There is no evidence that any support was offered and so on the merits, if the claim had been pleaded, we would have found that it was not well founded and dismissed it.

Unfair dismissal and victimisation

108. The Claimant asserts that he was unfairly dismissed and that the reason for his dismissal was his protected act of complaining of harassment. The Respondent admits the dismissal but denies both allegations.

Sections 98(1)&(2) and 135 ERA 1996

109. The Respondent's case is that in late 2018 and certainly in the first 3 months of 2019, the sales of its product had declined dramatically. As recorded in meeting notes and items of correspondence in the bundle, in the first 3 months 2018 the Respondent had seen sales of 100 barrels per month. By mid-March 2019 the total sales for that year was 85 barrels; a decline of around 70%.

110. The Claimant has accepted that in the first months of 2019 there had been times when he had little to do, that is corroborated by Mr. Mitchell's evidence.

111. The Respondent reached a decision that it could save costs by reducing its payroll expenditure. The decision was made to remove the Claimant's

role of Production Operative thereby saving the cost of that salary. We note that CF had resigned on 26th February [235] and she was not replaced.

112. There were, at that time, only two other employees; Mr. Ian Bellis, the owner and Mr. Mitchell, the employee who undertook most of the production. We also accept Mr. Mitchell's evidence that in the year flowing the claimant's dismissal Mr. Mitchell undertook those tasks which the Claimant previously fulfilled and no other person has been appointed to assist Mr. Mitchell.

113. The burden of proving the principal reason for dismissal under the Employment Rights Act 1996 Sections 98(1)(ii) rests upon the Respondent.

114. We are satisfied that the Claimant's role was identified as redundant in order to save costs and that there was a diminution in the need for work of the particular kind carried out by the Claimant. The Respondent has therefore proven that the principal reason for the dismissal was a potentially fair reason; redundancy.

Section 98(4) ERA

115. The next issue under the Employment Rights Act is under Section 98(4) and that is the procedural process by which the Respondent reached its conclusions. So far as we are concerned the history of the consideration of the claimant's dismissal starts with an item of correspondence between Kate Field, of Wurkplace.co.uk and Mr. Ian Bellis both on 28 February. We should put that in context.

116. The grievances raised by both CF and the Claimant had been subject to an investigation where both were interviewed and each had provided documents. By 28th February Workplace advised Mr. Bellis as follows:

"Thank you for the meeting this morning. The grievance investigation has now concluded and as we discussed I'll be sending both Andy (the Claimant) and (CF) a letter to confirm the following: Andy – his formal grievance is being upheld. There are however a couple of issues that are of concern regarding the "innuendo and banter" and also the incident he describes where he kissed CF on the head.

(CF) – I'll be letting her know her complaint against Andy is not upheld but that given the evidence that was found in the investigation had she not resigned she would have been invited along to a disciplinary."

117. We also note that in the letter sent to CF following the conclusion she was informed that but for her resignation:

"your conduct with a number of text messages you sent to Andrew and his wife fell well below the standard expected of an Amcrol employee and there is a disciplinary case for you to answer against you for gross misconduct in that regard." [1]

118. Following the decisions on the grievances it is apparent that Wurkplace and Mr. Ian Bellis had discussed two options with regard to the future relationship between the Respondent and the Claimant:

(1) to keep the Claimant under suspension and invite him to a disciplinary meeting which alleged potential gross misconduct, or dismissal for some other substantial reason, on the basis that the Claimant had been deliberately dishonest about Mr. Bellis during the investigation. There was an alternative of a 'without prejudice' discussion.

(2) The other option was redundancy*; "you describe the large reduction in the workload you've experienced which is ongoing and you no longer have any work for Andy to do. You informed me that prior to his suspension you were finding odd jobs for him to do as the work had dried up."*

119. It was not disputed by the Respondent that by 28th February, as set out in the Wurkplace note, Mr. Bellis had; *"decided that* [he] *wanted to choose option two".*

120. Following from that decision a letter was sent out to the Claimant to invite him to consultation. For reasons of confused email addresses the letter did not reach Claimant and so he attended work on 11th March to be informed that he was not expected work as his sick note had not expired. He was immediately placed on garden leave pending consultation on the redundancy.

121. That consultation took place on 14 March. We have a very short note of that consultation on page 262-264. Pertinent to the reasonableness of the employer's response is item 4 which says; *"there are currently now alternative roles within the business. Admin-covered: cannot do"* Subsequent to the meeting the note was annotated: "little *admin experience – bookkeeping, export documentation, Ian's partner Janet doing work and even though she has experience in medical offices she finds the work difficult*".

122. The note, in section 5, states that there is currently insufficient work to accommodate flexible hours or reduced number of hours and then at

1.[1] That the respondent considered CF's conduct sufficiently connected with work to warrant taking disciplinary action was a matter taken into account in relation to our judgment on the allegation of harassment.

section 6 it was stated that the Respondent would communicate with the Claimant any available vacancies and was; "*hoping by now in March work would have picked up"* and then stating that the Respondent was; "holding high stock level, which is unusual" from which we infer from that renewed production would not be necessarily occur if new orders were received.

123. With respect to alternative employment, the Respondent concluded meeting on 18 March states in relation to vacancies; *"I explained to you that the only vacant role within the company is the Administrator/Payroll Clerk however I feel that you do not have the skills for this role. Unfortunately, there are currently no appropriate alternative positions within the company."*

124. Having been told by the Respondent that the Administration role was vacant, the Claimant wrote to the Respondent a lengthy email with an attachment [page 283-287] stating he was qualified for administration work, he had 10 years' experience working with Microsoft Office and querying whether the Respondent had genuinely considered his abilities in that role.

125. This led to a further consultation which was summarised in a second meeting note wherein it was stated [at page 309]; *"I discussed with you your past experience that you raised within an email sent to me on 15 March…. You explain you feel you have experience which would enable you to be suitable for the Administrator role. Firstly, there's not an administrative role that you can apply for, the work is carried out on an adhoc basis. At the meeting you were asked to explain exactly what experience you had in MS Office and Sage Line 50 however you were unable to elaborate…"*

126. Mr. Bellis concluded by stating that he did not believe that the Claimant could work with the accountancy package and "*in any event I do not consider the administrative work is a suitable alternative role for you."* That brought to an end the consultation process and the Respondent dismissed the Claimant with notice and his statutory redundancy pay.

Discussion and conclusions

127. In relation to the consultation process and we have three concerns. Firstly, it is evident from the cross-examination of Mr. Ian Bellis and the summary of the discussions on or before 28 February recorded by Workplace.co.uk, that the decision to terminate the role had been made by that date.

128. There was no effective consultation with the Claimant as to whether the redundancy could be avoided or mitigated when it would have been reasonably straightforward to have done so before reaching that conclusion. Given that the Claimant might have accepted part time work or job sharing rather than dismissal and on Mr. Mitchell's evidence, no consultation had taken place with him, this was not a sterile enquiry.

129.Secondly, in relation to the consultation over suitable alternative employment, we are somewhat concerned about the Respondent's apparent change in position from the existence of the Administration post to the non-existence of that post after it became apparent that the claimant wished to apply for it.

130.Thirdly, the Respondent might well have had concerns about the Claimant's assertion of administrative competence but the Respondent did not consider giving the Claimant an opportunity to undertake a trial period in the role to see whether its disbelief was warranted or not.

131.For the purposes of section 98(4) the tribunal's task is to assess the reasonableness of the respondent's response in all the circumstances of the case. It is not for the tribunal to substitute its view for that of the employer.

132.In the context of a dismissal by reason of redundancy the tribunal has been guided by the dicta in in Williams v Compair Maxim Ltd 1982 IRLR 83.

133.The tribunal concluded that prior to the claimant's suspension on 18th February 2019 the respondent had made no mention of the possibility of redundancy. During the period of the ten days suspension no mention was made of possible redundancy. By the 28th February Mr. Ian Bellis believed the claimant had deliberately lied about him in the grievance investigation; a matter which he perceived as gross misconduct. By the same date Mr. Bellis had made a decision to make the claimant's role redundant. As noted above, the outcome of the grievance procedure, from Mr. Bellis' point of view was the termination of the Claimant's employment by one route or another.

134. The respondent is a small employer and some consultation, post the decision was conducted but, in our judgment, it was not done in good faith and the potential administration vacancy was withdrawn once Mr. Bellis became aware that the Claimant was intent on applying for that post.

The claim for victimisation.

135.The Equality Act 2010 defines victimisation in section 27 which states:

(1) 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.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;

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

136.The parties cited no authorities but the tribunal has directed itself as follows:

137. The detriment must be 'because' of the protected act: Greater Manchester Police v Bailey [2017] EWCA Civ 425.

138.The motivation of the respondent maybe conscious or unconscious; Nagarajan v London Regional Transport [1999] ICR 877.

139.The protected act need not be the only consideration affecting the respondent's conduct but it must be 'of sufficient weight': O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701.

Conclusions

140.We find the claimant's oral statements and two written complaints of the 15th and 19th February 2019 amounted to protected acts for the purposes of section 27 of the Equality Act 2010.

141.The Respondent does not dispute that it was aware of at least two of those acts; the verbal discussion in early February and he 19th February written complaint. We have found that Mr. Bellis was also aware of the 15th February letter.

142.The detriment asserted is the decision to dismiss the claimant; that is not disputed by the respondent.

143.Thus, the question that we must resolve is why, on 28th February 2019, had the respondent decided to dismiss the claimant?

144.The Respondent's case, based on Mr. Bellis' evidence is straightforward; the financial case for redundancy was the only consideration; his mind was neither consciously or unconsciously influenced by the claimant's complaints against CF.

145.The evidence which is relied upon by the Claimant is:

(1) The timing of the decision on his redundancy, essentially on or before the same date as the outcome had been reached in relation to the grievances.

(2) The unexplained change of the grievance outcome of the Claimant's grievance: which was documented by Wurkplace on the 28th February as being upheld but the 4th March outcome letter decision had been changed; his grievance was not upheld in any respect [223-229].

(3) That the content of the Wurkplace note suggests, on the Claimant's case, that following the Claimant being cleared of the allegations against him and his own allegations in part upheld, the only option Mr. Ian Bellis was considering was the termination of the claimant's employment albeit by three alternative paths, as noted above.

(4) The withdrawal of the alternative employment when the Claimant made a determined application for that role.

(5) That Mr. Bellis was not a reliable witness before the tribunal.

The Claimant has proven that Mr. Ian Bellis had an antipathy towards the him; it is evident in the Wurkplace summation on possible reasons for the claimant's dismissal that Mr. Bellis considered that the Claimant had deliberately lied about providing a grievance on the 15th February, an act of potential gross misconduct.

146. The Claimant has proven that, as of the 28th February Mr. Ian Bellis had a settled intention to dismiss him.

147. We must then assess whether the Claimant has established that it is more likely than not that his dismissal was in a significant way, influenced the protected acts.

148. We first considered whether the Claimant had established a prima facie case for the purpose of section 136. It is not in dispute that the respondent was aware of the protected acts and the detriment is admitted. Those two considerations are insufficient to establish a prima facie case. The claimant bears the burden of proving a causal link between them. The evidence of such a link must be of such quality that a tribunal could properly conclude from that evidence that the claim is well founded.

149. We took into account the first four elements of paragraph 146 above. We also took into account the content of the Claimant's formal accusation in his 19th February grievance; that Mr. Bellis had victimised the claimant and Mr. Bellis had failed to deal with his earlier complaints. We also took into account our conclusion that Mr. Ian Bellis had an antipathy towards the Claimant for the reason noted above.

150.The co-incidence of these considerations is, in our judgment, sufficient to require the respondent to demonstrate that its decision was not discriminatory.

151.The only person engaged in the redundancy decision making was Mr. Ian Bellis.

152.We have a number of concerns about Mr. Bellis' reliability as a witness. We note the following as examples:

153. His evidence during cross examination, relating to the letter sent to CF about the gross misconduct proceedings (that she would have faced, had she not resigned) he stated expressly that CF's alleged misconduct was unrelated to the content of the Claimant's grievance where that was manifestly not so on reading of the letter [234].

154.He had pleaded a case that the Respondent had thorough policies on equality which it did not.

155.He asserted that Claimant's grievance appeal had been refused because it was out of time when it was not out of time.

156.He then asserted an alternative explanation; that he did not know how to deal with the grievance appeal because he could not understand what "a higher authority would be" for a person to determine the appeal. This was not true; the bundle included written advice from Wurkplace and evidenced that Mr. Bellis had been clearly advised upon what he needed to do.

157.We have been also taken into account that, relative to the Claimant, he was a less reliable witness in relation provision of the 15th February written grievance and prior oral complaints.

158.We have also been concerned that when we considered Mr. Bellis' witness statement at paragraphs 36 and 37 it was somewhat contradictory.

159.In our judgment Mr. Bellis' explanation; that his motivation for dismissing the Claimant was unrelated the protected acts, is not credible. We consider it far more likely he was offended by the Claimant's allegations that Mr. Bellis had victimised the Claimant and failed to deal with earlier complaints of sexual harassment.

160. In conclusion we have concluded that the claimant has proven that it is more likely than not that the Mr. Bellis' decision to dismiss the claimant by reason of redundancy process was consciously or unconsciously tainted by victimisation. For these reasons the claim of victimisation is well founded and succeeds.

161. The degree to which the victimisation affected the dismissal is probably moderate. We are satisfied that there was a genuine diminution in work for the role of a production operative and that it is more likely than not that the claimant's post would have been made redundant at a later point. This matter will be considered as part of the assessment of remedy.

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Employment Judge R Powell
Dated: 10th April 2020

REASONS SENT TO THE PARTIES ON

……14 April 2020……

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS