EMPLOYMENT TRIBUNALS

Claimant: **Ms S Cowley**

Respondent: **Auto Sleepers Group Limited (t/a Marquis Leisure)**

Heard at: **Southampton** **On:** **8 October 2020**

Before: **Employment Judge Rayner**
Members Ms C Lloyd Jennings
Mr P Flanagan

Representation
Claimant: **Mr Wright, Lay Representative**
Respondent: **Mr Tunley, Counsel**

JUDGMENT

1. The claimant was wrongfully dismissed by the respondent.

2. The claimant was discriminated against contrary to Section 26 of the Equality Act 2010 in that she was subject to harassment on grounds of sex by John Goble.

3. The claimant's claims of direct discrimination contrary to section 13 Equality Act 2010 are dismissed.

4. By consent, it is agreed that the Respondent will pay the claimant £15,000.00 in respect of damages for harassment and wrongful dismissal.

REASONS

1. On 18 April 2019 the claimant presented a claim for unfair dismissal, wrongful dismissal and sex discrimination.

2. The claimant's claim arose from the termination of her employment on the 15 February 2019 and various events leading up to her dismissal.
3. The claimant was employed by the respondent as a handover specialist. She worked with customers who were purchasing caravans and motorhomes from the respondent, at the point that the vehicle was handed over to the customer. Her job was to explain the various features of their new caravan or motorhome.

4. The claimant was employed by the respondents from 27 February 2017 until 15 February 2019, when she was dismissed.

5. The claimant did not have the necessary continuous service to claim ordinary unfair dismissal, but she alleged that her dismissal was an act of discrimination on grounds of sex.

6. The claimant claimed sex discrimination by direct discrimination contrary to section 13 EQA 2010 and harassment on grounds of sex and related to sex contrary to section 26 EQA 2010.

7. The claims of sexual harassment are based on comments that the claimant alleged her manager, Mr Goble, had made in the workplace, and posts that he had added to work What's App group. The claimant alleged that Mr Goble started making lewd remarks about women within a few days of him starting work with the business.

8. The claimant alleged that Mr Goble regularly made lewd comments and that he was generally unsupportive of her and her partner who was suffering from a rare cancer at the time.

9. The claimant alleged that in January 2019 she was added without her knowledge or consent to a work What's App group that had been set up by Mr Goble.

10. The claimant alleged that Mr Goble had added offensive and discriminatory material to this social media group, causing her offense.

11. The claimant's allegations were set out in paragraph 10 of her ET1 and gave 3 specific examples, describing particular posts which she had found threatening and offensive. She alleged that these posts made her feel that her manager could humiliate her at work at any time.

12. The claimant's direct discrimination claims arise from a series of instances of alleged less favourable treatment of the claimant by the respondent, including the events leading up to her dismissal, and the dismissal its self.

13. The claimant states that her dismissal followed a 7-minute hearing at which she alleges she was provided with a pre-written letter informing her that she had been dismissed for poor performance. The claimant asked for a reconsideration, but this was denied. The claimant denies that she was ever given any formal warning of poor performance, or told how she ought to improve.

14. The claimant asserts that her contract of employment set out a specific procedure in respect of termination of her contract which the respondent had failed to follow.

15. The respondent defended the claim denying the claimants allegations of sex discrimination and sexual harassment.

16. The respondent denied that the claimant had been joined without her consent to the What's App group and denied that any of the posts amounted to sex discrimination and denied that her dismissal was unfair, or that her dismissal or

any other treatment of her or act by Mr Goble or the respondent was less favourable treatment or sex discrimination. A reason related to sex.

17. The respondent further denied that the dismissal was in breach of contract and therefore wrongful. The respondent asserted that there had been concerns about the claimant's capability which had been discussed with her and that this was the reason for termination of her contract of employment.

18. The respondent asserts that the contract allowed them to disregard the contractual provisions in the claimant's case, and that they dismissed her because of concerns about performance before she reached the two year service mark.

19. Following a case management hearing before employment Judge, written on the 25 November 2019, the claimant provided a schedule of less favourable treatment which detailed allegations from October 2018 until December 2018 and a separate schedule in respect of the allegations of sexual harassment arising from the What's App group posts, setting out the dates that she was joined to the group and the dates of the particular posts she was relying on.

20. The respondent filed an amended response in respect of the matters set out in the claimant's schedules.

21. The respondent denied that Mr Goble had made comments as alleged; denied that he had shouted at the claimant in respect of the satnav and further denied all the allegations set out as set out.

22. In respect of the What's App group the respondent accepted that there was such group, but denies that posts had either the intention or effect of degrading the claimant or women and denying that they were capable of amounting to harassment under the EQA 2010.

23. The respondent further asserted that the alleged posts were sent outside work hours, and that therefore the respondent would not be vicariously liable for a

private What's App group created and used outside working hours, the content of which was entirely social and unrelated to work.

24. A further case management hearing then took place on 30 January 2020 before Employment Judge Fowell. At that hearing the issues between the parties were defined as follows:

25. Section 26 harassment on grounds of sex

26. Ms Cowley alleges the following instances of unwanted conduct of a sexual nature

    26.1. In early October 2018 in front of her and other female colleagues, Mr John Goble described sexual conquests at a company event and explained how he gets a woman to *sit on his face*;

    26.2. Mr Goble added her to a What's App group without her consent and placed a series of posts of a sexual nature on the group site, including

        26.2.1. a link to a BBC article on super gonorrhoea;

        26.2.2. a screenshot of a woman's face close to a cats body which is alleged could be as interpreted as relating to oral sex;

        26.2.3. a screenshot of a meme of a woman with her middle finger raised and Mr Goble remarking on it;

27. Further, Ms Cowley alleges the following instances of unwanted conduct related to sex

    27.1. in early October 2018, Mr Goble shouted at her over the return of a satnav system, saying *stop mithering me* when she asked him whether he had returned one he had borrowed

    27.2. shortly after 19 October 2018, when she was asked to go to Southampton to do a handover on a mobile home, Mr Goble told her he could sack her at any time, if she did not do as he said

    27.3. Mr Goble rejected her request for compassionate leave and instead invited her to apply leave from days in lieu

    27.4. Mr Goble described her as not the right person for the role in front of a colleague, Mr Esposti,

27.5. in December 2018, Mr Goble described her as lazy in front Mr Esposti

27.6. in December 2018 Mr Goble described her as unproductive in front of Mr Esposti

27.7. by email dated 3 December 2018, Mr Goble told her to show a marked improvement, by contrast, male members of staff Mr Lancashire and Mr Pickering who were also warned about their performance were told that their performance was being looked act. What needed to improve and how long they had to improve.

28. The further issues are as follows

28.1. with regard to the What's App posts, were they posted by Mr Goble, and if so, were they made in the course of his employment?

28.2. with regards to the allegations in paragraph 3.2 above, were they related to her sex?

28.3. did any such conduct have the purpose or effect of violating Ms Cowley's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her ?

29. Direct discrimination on grounds of sex

29.1. did the company treat the claimant less favourably than it treated or would have treated someone else in the same circumstances, apart from her sex?

29.2. the less favourable treatment the claimant alleges is as follows

29.2.1. any conduct not found to have been harassment

29.2.2. Mr Goble brought flowers for a male colleagues wife after an illness in late October 2018, but not for Miss Cowley when her partner was ill with cancer. This allegation is in addition to being refused compassionate leave which also related to her partners illness.

29.2.3. She was subsequently dismissed, and

29.2.4. in particular she was dismissed without due process

30. Breach of contract dismissal procedure

30.1. was Ms Cowley dismissed in breach of a contractually binding procedure?

30.2. if so when, when would she had been dismissed, if at all, if that procedure had been followed?

30.3. the relevant documents of the contract of employment are at clauses 13.1 (a) 13.2; 13.3; 14.6 and 14.8 and of the staff handbook at section 19 under Disciplinary Processes

31. Time Limits

31.1. as previously noted, the claim form was presented on 18 April 2019 within a month of the end of early conciliation through ACAS. That period began on 19 March 2019. Any act or omission which took place more than 3 months before that date, that is 20 December 2018 is potentially out of time

31.2. Were any events that took place before 20 December 2018 part of the course of conduct extending over a period of time and ending after that date, all would it be just and equitable to extend normal time limit?

The hearing

32. the hearing took place over 4 days. The panel was provided with a bundle of documents of 263 pages, which contained the contractual documentation, various notes of meetings, email exchanges between the claimant and her manager email exchanges between Mr Goble and the claimants' comparators as well as copies of the various posts alleged to have amounted to harassment.

33. We heard evidence from the claimant on her own behalf and from Mr Goble; Mr Davidson**-** Bowman and Mr Lankshear on behalf of the respondent.

The applicable legal tests

Direct discrimination (s.13 Equality Act)

34. Some of the Claimant's claims were brought under s. 13 of the Equality Act 2010:

"*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.*"

The protected characteristic relied upon was sex.

35. The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

> "*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

36. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

> "*(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.*"

37. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that sex may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself is generally of little helpful relevance when considering the test. The treatment should be connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than actual or hypothetical men because of her sex.

38. The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the

inference that fell to be rebutted (*Network Rail-v-Griffiths-Henry* [2006] IRLR 856, EAT).

39. If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32). Similarly, in a case in which the act or treatment was inherently discriminatory, the reverse burden would not apply.

40. When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see *Fraser-v-Leicester University* UKEAT/0155/13/DM). In *Shamoon-v-Royal Ulster Constabulary* [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider ‘the reason why’ something happened first, in other words, before addressing the treatment itself.

41. As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se but *less* favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (*Law Society-v-Bahl* [2004] EWCA Civ 1070).

42. We reminded ourselves of Sedley LJ’s judgment in the case of *Anya-v-University of Oxford* [2001] ICR 847 which encouraged reasoned conclusions to be reached from factual findings, unless they had been rendered otiose by those findings. A single finding in respect of credibility did not, it was said, necessarily make other issues otiose.

HARASSMENT

43. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

44. As to causation, we reminded ourselves of the test set out in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived ***her*** the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

45. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Wrongful dismissal

46. An action for wrongful dismissal is a common law action based on breach of contract. It is very different from a complaint of unfair dismissal. The reasonableness or otherwise of an employer's actions is irrelevant: all the court has to consider is whether the employment contract has been breached. If it has, and dismissal is the result, then it is wrongful — but it is not necessarily unfair. Conversely, an unfair dismissal is not necessarily wrongful. Any

dismissal by the employer in breach of contract will give rise to an action for wrongful dismissal at common law. This will include a dismissal by the employer in breach of a contractual disciplinary procedure.

47. Where the employer's breach of contract consists of a failure to follow a contractual procedure for dismissal, the conduct of which is a precondition for giving notice, damages are similarly calculated on the basis of putting the employee back into the position he or she would have been in if the employer had not dismissed in breach of contract. In other words, the employee must be put in the position he or she would have been in if the employer had carried out the contractual procedure and given proper notice. This will normally have the effect of lengthening the damages period by the amount of time it would have taken for the employer to follow the correct procedures.

Findings of fact

48. We set out below our findings of fact, and the conclusions we draw from them. We then summarise the conclusions at the end of the judgment.

49. From the time the claimant started work for the respondent in February 2017 and for the first twenty months of her employment she had a manager called Mr Linden Stead. There is no evidence that there were any difficulties with her work during that period of time and the claimant's evidence, which was not contradicted by any direct evidence from the respondent, was that she had no difficulties at that time with her work, got on well with her manager and loved her job.

50. In the absence of any direct evidence from the respondent, we reject the respondent's assertion that the claimant's former manager did not like her. We accept the claimant's evidence that he was supportive of her, she respected him and they remained friends after he left. We also accept her evidence that there were no issues raised with her by him about her work at all during that period or by anyone else and we accept her evidence that she had good feedback from her manager and from her customers.

51. We have been referred to the contract of employment and we make findings in respect of the terms below at paragraphs 90-92. There is also a staff handbook.

52. Following Mr Linden Stead leaving the respondents employment and in October of 2018 Mr Goble started working for the respondents. His first period of employment was spent at a training course in Durham and the first time he came into the office was around 13 October 2018, which was the first occasion on which the claimant and Mr Goble met.

53. On that occasion they exchanged phone numbers and we accept that the only reason they did so was for work related reasons. We accept the claimant's statement that her phone number was only ever intended to be used for work purposes.

54. The claimant alleges and we find as fact that within the first few days of starting work she overheard Mr Goble talking to other members of the team, including a Mr Ballard and somebody called Rob from the Services Department in the office. The claimant alleges and we accept that Mr Goble relayed a story of how he had asked a woman to sit on his face whilst he was either at a training course or in a bar and that he had said that he had been threatened to be thrown out because of his comment. She said that the men laughed, but that she didn't find it funny and in cross examination she said it was offensive. The only other person we have heard evidence from about this is Mr Goble who denies he said it. He told us that the training course was a work course and he had not been socialising and it was not the sort of thing that he would say.

55. He also said that the words were disgusting and vile whether said by a manager or not and it was not something he would expect anyone to say in the workplace. We agree that the words were inappropriate and unpleasant and they are not the sort of thing a manager should be saying in the workplace. There is a conflict of evidence but we prefer the evidence of the claimant, who we found to be generally honest, although sometimes mistaken about the cause of treatment. We find, and set out below, that Mr Goble was not honest about the purpose of the Whats App group, the fact that the claimant was joined

without her knowledge or consent or about his responsibility for posting some of the posts. We also find that he was not truthful about the process of managing the claimant or about the process of her dismissal. We prefer the claimants evidence. She remembered the comment both because of what was said, and because of when it was said. We find the words were said by Mr Goble as described by the claimant.

56. The respondent has placed some weight on the fact that the claimant did not complain about this at the time or at the point of the appeal and the first time she raised it was in her ET1.

57. The claimant's evidence, which we accept, is that she didn't complain at the time because she didn't think that Mr Goble would be in post very long, because she thought he was out of his depth and would be gone soon. We also accept that she did speak to other women colleagues at about this time, about Mr Goble, and that she had formed a view of the sort of man that Mr Goble was and did not feel confident in raising concerns with him or with other managers.

58. She told us that she didn't know why she didn't put it into her appeal but does say that she was very upset by the way her employment was terminated and she had been suffering from depression at the time. We accept this. The fact that the claimant did not raise it at the time, or put it in her appeal does not mean it did not happen.

59. The claimant has made other allegations about Mr Goble that he had made other rude comments on a regular and continuous basis. She hasn't been able to give specific examples and Mr Goble denies that he made such comments. We are not able to make any findings of fact in respect of unspecified remarks. Whilst we accept that the claimant may have considered that there was poor behaviour by Mr Goble, there is no evidence before us of any other such comments being made and we place no weight on the unspecified allegations.

60. We next consider an issue which arose in relation to the satellite navigation unit. (the Sat nav).

61. The claimant had responsibility for ensuring that the individual sat nav units which were provided for use with the caravans and motor homes were kept locked in the office. On one occasion Mr Goble admits that he borrowed one without telling the claimant. He said it was for his ex-partner to use and he says that he borrowed it with the knowledge and agreement of his senior manager. He also admits his partner broke it and he then needed to replace it at his own expense, which he says he subsequently did.

62. The claimants concern was that she says he didn't tell her that he had borrowed it. it was not until she asked him where it was, that she became aware that he had taken it. It was only later on that she was told by Mr Lancashire that in fact it had been broken and that Mr Goble had to replace it. We have seen an email dated 19 October from Mr Goble to the claimant saying he had popped a replacement sat nav with the rest in his office.

63. The claimant says before he replaced it, she asked him about it and he shouted at her. She says that he never shouted at male colleagues and that this was different treatment because she is a woman.

64. In her oral evidence, she said that he shouted at her and told her to stop bothering her. There is a difference between the description in her witness statement and the way she described the words said before us in oral evidence, but what she says is that his attitude seemed to be that she should *get out of his hair*. She said he told her with words to the effect that *you women are all the same, stop mithering*. In her statement she said she remembered him saying stop mithering but may have misheard and may have said bothering. Mr Goble denies that he shouted at her or was aggressive or raised his voice or told her to stop bothering or mithering him or used the words that *you women are all the same*.

65. The question for us is whether, when the claimant asked Mr Goble about it, he shouted at her, as she alleges, and if he did whether this was less favourable treatment on grounds of sex.

66. We find on balance of probability, that whilst there was an altercation and whilst Mr Goble may well have raised his voice that the words *you women are all the same* were probably not used. However, we accept that the claimant may have considered that Mr Goble was unsupportive and unsympathetic at the time and that that was the reason for her concern about it.

67. On one occasion, the claimant was asked by Mr Goble to do a handover at the Southampton branch, because there was nobody to do a handover on the Friday. The claimant says and we accept that she was apprehensive because the model being handed over was a new product which she was not familiar with. Despite this, she says that she was happy to go but she did question whether she was the right person to do it. She told us that Mr Goble seemed to get irritated and told her that her previous manager had not liked her, that Mr Davidson and Mr Bowman did not like her and that he, Mr Goble, could sack her at any time.

68. Mr Goble denies that he made these comments or shouted at her and said in his evidence to us that if he was going to discipline her he would do it with a witness and with her line manager.

69. The claimant said that she found him intimidating and that she was upset by the suggestion that she was disliked by her previous manager. We find that words to the effect that Mr Goble could sack her and people didn't like her including her previous manager were made to her at this point.

70. The next issue is in respect of compassionate leave. The claimant was suffering from severe menopausal symptoms and at the same time, her partner was suffering with a rare tumour which required treatment in London. When he went for treatment the claimant escorted him.

71. The claimant says in her ET1 that Mr Goble never offered her compassionate leave. We find that this is correct, he never did. We find that Mr Goble was aware that the claimant herself was suffering with ill health and certainly he told us that he had always paid her discretionary sick pay. He also knew that the claimant's partner was unwell and required hospital treatment and that it

required her to accompany him, because he also told us that he allowed her to work extra hours so that she could bank additional lieu days.

72. The claimant has suggested that the problem was a refusal of Mr Goble to offer compassionate leave, but she accepts and we find that she did not in fact ever ask him for it. Mr Goble has said to us that had she asked for compassionate leave that he would have considered it. He has told us and we accept that as far as he was aware, compassionate leave was really only available for bereavement.

73. The claimant says that she felt she was required to jump through hoops to get the leave and that Mr Goble was reluctant to grant the leave to her. He denies this. We accept that in this respect Mr Goble was not asked to do anything in particular and that had he been asked he may well have behaved differently. We also accept that the claimant was suffering herself with her health and with her partner's health and looked to her employer for a more proactive approach.

74. The claimant also raised a concern that Mr Goble had sent flowers to a colleague whose partner was ill but had not sent them to her. Mr Goble accepts this, but explains the flowers were sent because the person's partner had suffered a second miscarriage.

75. In respect of these matters and the issue with the sat nav, the allegations of shouting, the claimant's complaints about compassionate leave and the sending of flowers to a colleagues partner but not to her, we find as follows.

76. We accept that the claimant may have felt that Mr Goble was not treating her as he may treat others, and accept that he did treat her differently to other male employees in respect of the sending of flowers.

77. There is no evidence that, in respect of compassionate leave or the incident with the sat navs, of any different treatment, and at most of the evidence is of inappropriate responses from Mr Goble. We have made no findings of fact from which we can conclude that a hypothetical other man would have been treated any differently in similar circumstances.

78. In a sex discrimination case it is for the claimant to prove that there is less favourable treatment between her and a comparable man, either an actual man or hypothetical man in the same or similar circumstances. She has not done that here.

79. In any event in these circumstances there is no evidence that the comments made or the fact that the claimant was told that previous managers didn't like her was anything to do with sex or to do with the claimant being a woman.

80. In respect of the compassionate leave and the sending of the flowers we accept Mr Gobles explanations, and we find that the explanations were nothing to do with the claimant being a woman or with sex.

81. We conclude in respect of these allegations that there is no different treatment or, where there is it is not on grounds of sex. We also find that there is no unwanted conduct which is related to sex for the purposes of harassment. Even if Mr Goble was rude or shouted, we have made no findings from which we can conclude that the behaviour was related to sex.

82. On 3 December the claimant was invited to a meeting by Mr Goble with Mr Esposti, who was her direct manager, in attendance. We have seen a note of the meeting. It is very short but it notes *unproductive, lazy does not work unsupervised*. It also notes that the claimant was given a job specification and that she felt her job was going better in the role. This was the first occasion on which the claimant was provided with a list of her duties and the list she was provided with was clearly something that had been produced for the purposes of that meeting and it was first time the claimant had seen it.

83. The claimant described this meeting as an informal appraisal and in her ET1 said it was broadly positive. She made no reference in her ET1 to concerns she had at the time about being called lazy or unproductive or to finding the remarks offensive or having caused her any concerns at all. The claimant was not provided with a note of the meeting at the time.

84. She was upset by the remarks subsequently, and this is set out in her witness evidence.

85. The claimant relies on the comments as acts of harassment and direct discrimination. Whilst she was clearly annoyed about the comments that had been made by the time she wrote her statement, and when gave her evidence before us, the question for us, in respect of harassment at least, is whether or not she was annoyed or upset at the time.

86. She says that her manager never called male colleagues lazy or unproductive. Certainly, we have no evidence before us of how other male colleagues were treated in the same circumstances but we do have evidence of how Mr Goble communicated with two other men and in fact, in this case there is an email sent to the claimant after her meeting, one of the purposes of which was to discuss with her to appraise her performance and we also have emails in respect of two men in similar circumstances. There is no indication of any comment that a male employee is lazy or unproductive.

87. Following the meeting, the respondent asserts that the claimant should have known three things. Firstly, she should have been aware of what it was that she was failing to do. Secondly, what it was she had to do to improve her performance and thirdly, that if she did not improve that she was at risk of being dismissed.

88. We find that none of those things were in fact things that the claimant would have known at the end of that meeting. We find that the meeting was not a formal meeting under the procedures set out in the contract or the handbook but it was, as the claimant has said, an appraisal meeting. It was the first one that she had had and it was, as she said at the time, a broadly a positive meeting.

89. We find that the claimant was not, at the time, upset about any comments that were made to her in that meeting.

90. We find that contrary to the assertions of the respondents, the claimant was not given any form of oral or written warning within the meaning of respondent's contractual procedure and that there was no reason for the claimant to believe that she was at any risk of dismissal at any stage as a result of that meeting.

91. If the respondents had really intended to warn the claimant that she was at risk of dismissal if she did not improve, we find that they would have done so in the meeting in a clear way and that the claimant would have understood that she was being warned formally. We also find that the respondent would have put it in the email they sent on 3 December, or recorded it as a formal warning in the note of the meeting.

92. The claimant says she didn't see the email sent on 3 December and we accept that she did not. It does not matter that she did not see it however, because we find that the email sets out what the respondent was saying after that meeting. We find that the reality of the meeting was that it was a first appraisal meeting and whilst the claimant's performance in her role was raised and discussed, it was not raised and discussed in the format of a warning to her but rather in the form of an appraisal discussion.

93. We also find that the respondents did not in fact, at the time, consider that the claimant had been given a warning. We find that not only was no warning given but that the respondents did not at that point in time on 3 December consider that they were engaged with any formal process.

94. The claimant compares herself at this point with two men, Mr Lancashire and Mr Pickering. Mr Goble sent emails to each of these men about their performances.

95. We find, having looked at both those emails and the email sent to the claimant that whilst they were doing different jobs, the circumstances that they were in were broadly similar to that of the claimant, in that they were all being looked at by Mr Goble for the purposes of their performance.

96. The tone of the email to the claimant is very different to the tone of the emails sent to her two male comparators. The one to the claimant is formal, makes no suggestion of anything the claimant is doing well and offers no real encouragement to her. It does not set out how she needs to improve.

97. In contrast the emails to both men are friendly, supportive and encouraging in tone. We find that there is a difference in the tone of the emails written to the two men and the tone of the email to the claimant. This is, we find a difference in treatment. It is also a difference in sex, as the claimant is a woman and the other two individuals are men and we must therefore consider whether or not there are facts from which we could conclude in the absence of an explanation that there has been sex discrimination.

98. To do that we need to consider whether or not we have made any findings of fact which support the difference in the treatment being on grounds of sex. It is only in those circumstances, if we find that the burden of proof would shift to the respondents, that the treatment would require an explanation.

99. We conclude having considered all the matters in the case on this particular issue that there are no facts from which we can conclude that the difference in tone of the emails is on the grounds of sex.

The Whats App Group

100. The next issue concerns the setting up of the WhatsApp group and the sending of the messages or posts.

101. We find that the WhatsApp group was raised as an idea by Mr Goble as a way of work colleagues staying in touch with each other. It was raised by him and discussed with work colleague at a work event shortly before Christmas, and before the two departments got together to have pizza.

102. Mr Goble said that the claimant was at that meeting, but we accept the claimants evidence that she was not. In fact she was accompanying her partner

to a hospital appointment for which she had taken leave. Mr Goble would have known this.

103. At that meeting, there was a discussion about setting up a WhatsApp group for keeping in touch with work colleagues, staring with the Christmas period, and there was agreement between the people at that meeting that this was a good idea.

104. In fact, it wasn't set up until after Christmas. When it was set up, it was a group set up by Mr Goble, in his role as a manager of the respondent, for work colleagues. Mr Goble gave it the label, work group. The group was not a private group, and it only included individuals from the workplace.

105. The fact that once it was set up, it may have been used by members of the group to post things that were not work related, does not alter the fact that it was a work group.

106. We find that it was set up in the course of Mr Gobles employment with the respondent. The only reason that the claimant and others were joined to the group was because they worked for the respondent.

107. The claimant did not join the group, nor was she asked if she wanted to join the group. She did not as the respondents asserted received= an invitation which she accepted, but in fact, she was joined to the group, using the telephone number she had given to Mr Goble, without being asked and without her consent.

108. The respondents now accept that the claimant was not invited to join and did not join as a matter of her choice, but rather she was joined to the group without being asked.

109. Whilst this was accepted in evidence before us, Mr Goble and the respondents have not accepted this basic fact until this hearing. The claimant has had to continue to argue the point about whether or not she was given an opportunity to accept or not. The respondent's response was implying that the

claimant was not being truthful about this matter. In fact, the respondents knew well in advance of this hearing that she was right and was telling the truth, but did not a make this clear either in advance of hearing, or in their witness evidence.

110. Whilst it has been has accepted before us that the claimant was joined without her knowledge or consent, we consider that this is indicative of the approach the respondent and Mr Goble in particular took to the evidence. He failed to admit the truth of the claimants assertions, even when he knew or should have known she was telling the truth.

111. The respondent suggests that the claimant could have left the group at any time. She did not do so. The claimant tells us and we accept that the reason she did not leave the group immediately was because she thought it was a work group. We find that that was an entirely reasonable assumption and was in fact a correct assumption for her to make.

112. We have looked at the posts which were sent and which the claimant complains about. First of all, we have looked at them individually.

113. We have looked at the post that was sent to Katie (I will refer to as the old lady text). Mr Goble was a manager and the comment to his junior staff about a woman's appearance have the potential to cause offence. If this were the only event we would not consider that, of itself it would amount to sexual harassment. Whilst it is a comment about a woman colleague and whilst we consider that it is an inappropriate comment for a male manager to make about a female junior member of staff and whilst we accept that it did indeed upset and offend the claimant, she does accept that this was not something that caused her great concern, although she was upset by it and she thought it was inappropriate. The claimant does not suggest that this alone , although unwanted by her, violated her dignity, or created the adverse statutory environment for her.

114. However, we accept that this does not occur in a vacuum.

115. This is a post that is sent on a work based WhatsApp from a male manager who has made the remarks that we have found earlier on in the relationship. It is also one which is followed by subsequent posts which we find are offensive and capable of amounting to sexual harassment.

116. The second post, the one referring to the sexually transmitted disease is offensive and on its face, is clearly related to sex, it is about women, it is about a sexually transmitted disease and it is sent to a male member of staff who is off sick with the clear suggestion that he has caught a sexually transmitted disease from a woman.

117. Whilst Mr Goble may not have thought about it at the time, we accept that when claimant received it, at that point in her employment, on a work group WhatsApp platform, it did cause her offence. She did form the view that her manager was making an implied suggestion, consciously or unconsciously, that women are dirty and that women catch gonorrhoea, and that her colleague Bill had caught something from women. This was unwanted by her and it was offensive to her. Her response to it was we find a reasonable one.

118. The respondent says that the STD post was not directed at women but that is irrelevant. The fact is that it was sent to everybody on the post and that it was unwanted by the claimant, it was related to sex and we find it did violate the claimant's dignity as a woman. She received this post, on her phone, from her manager. We find that it did create the relevant statutory adverse environment.

119. The next post and the one which caused the claimant to remove herself from the WhatsApp group is the picture of the cat and a woman. The claimant says in her ET1 that it is a picture of a woman giving a cat oral sex. These posts were further evidence she says, of her manager's attitude towards women. She says she felt threatened by him and that there was always the potential that he could humiliate her or other women. In her witness statement she says it was vile, unacceptable, offensive and degrading to the female gender. The claimant had to continue working with him and as she said, look him in the eye after she had seen it. She says in her further details that it was

degrading to women and sexually explicit. She says there were no references to men in any similar degrading or sexual manner within the WhatsApp.

120. We find that this post was entirely capable of causing the offence that the claimant says she took. We understand why she considered it to be a sexually explicit and inappropriate post. We note that the respondent and Mr Goble in particular, denied that he had sent any such post and in their ET3 suggested that the allegation itself was untrue, until such time as disclosure of the posts were provided. We find that Mr Goble was simply dishonest about this and that he must have known that he had sent the post but chose not to confess or to admit to it at an early stage in the proceedings.

121. Again, the result of this denial was of requiring the claimant to go through the process of having to prove that the post had been sent and sent by him.

122. We find that the post was unwanted, was related to sex and did violate the claimant's dignity and create an humiliating and offensive work environment for her. We find it was reasonable for it to do so and conclude that this was an act of sexual harassment.

123. This is an act of sexual harassment whether intended or not.

124. We find that this is an act of harassment which in context is part of a continuous course of conduct in that the various acts of harassment we have found created the hostile, offensive or degrading or otherwise an adverse environment for the claimant and offended and violated her dignity.

125. We have also considered the cumulative effect of the posts, and find that cumulatively they had the effect of violating the claimants dignity and of creating an offensive and or humiliating environment for her. They are cumulatively about sex, and it is reasonable to treat them as sexual harassment, in context.

The Claimants capability issue

126. The next thing that happens is that the respondent says that they held a meeting with the claimant on 9 January 2019. We have been provided with a witness statement by Mr Esposti but he has not given evidence before us.

127. The only people who can give evidence about the meeting are therefore the claimant and Mr Goble. The claimant asserts very firmly that no such meeting took place. Mr Goble says that it did. There are no specific notes of this meeting, although there is a reference to the date on the note that we have been provided of the 3 December meeting. This is a note made by Mr Goble.

128. We have heard no evidence of any particular detail of the meeting and we find that it did not in fact happen. There is no reason, we find, for the claimant to deny attending such a meeting of that type on that date. On the balance of probabilities and given what we have already found about Mr Goble's honesty and other situations we find it is more probable that the meeting did not take place and that the claimant is right, than that it did take place and she has forgotten about it.

129. In February 2019, there was an exchange of emails about photographs of caravans and mobile homes. The claimant told us and we accept that the claimant was at this point using her own mobile phone to take photographs because the company tablet was broken or had been mislaid or was elsewhere in the business, but not available for her to use, and the respondent accepts that. She was therefore on her phone whilst at work for these purposes. This is not a matter that was ever explored or discussed with the claimant.

130. At some point in February 2019 a decision was made by the respondents that the claimant would be dismissed. Mr Goble told us that the decision was his. We have also seen an email from Mr Davidson Bowman who gave evidence to us of correspondence stating that a letter would be emailed to Mr Goble inviting Sarah (the claimant) to a meeting the following day to terminate her contract. This is dated 14 February 2019.

131. Prior to this on 12 February, Mr Goble had sent an email to the claimant in respect of the photographs referred to above. The claimant had confirmed that

she had taken photographs as requested and that they were being processed. Mr Goble says in his reply I *did not doubt you for a second*.

132. When asked about this in evidence, Mr Goble said he didn't want to make the claimant feel bad at work, but we find that, in reality this was an expression of his thoughts about her at the time.

133. Also, on 12 February 2019, as the claimant states in her appeal letter, Mr Goble had told her he was pleased with her performance and that she would be receiving a £50 performance related bonus. This has never been denied. When Mr Davidson Bowman was asked about it, he said it was not a matter that they had taken into account when the appeal was considered by Mr Crouch.

134. We find that at that point the reality is that Mr Goble considered that the claimant was doing well. There is no reason for anybody to be given a £50 performance related bonus if their performance is so poor that instant dismissal is an appropriate outcome.

135. On 15 February Mr Davidson Bowman sent Mr Goble an email headed *Invitation to A Disciplinary Meeting*. The email says that a termination letter will be sent shortly. At that point the decision to dismiss the claimant had been made, and made in advance of the meeting. The meeting was not, in reality a disciplinary meeting, but was a meeting to inform the claimant of a decision taken.

136. The letter was sent to the claimant inviting her to the meeting. What it says is that the meeting would be a disciplinary meeting, that her performance would be discussed and she *will have an opportunity to reply*. It says if her reply is not satisfactory the formal stage of the disciplinary procedure will be applied and she may be dismissed.

137. At this point the respondents had already decided to dismiss the claimant and therefore this letter is wholly misleading and dishonest. There was no intention on the part of the respondents to hold any sort of disciplinary meeting.

The claimant was handed the letter and the meeting took place later the same day.

138. We accept the claimant's version of the meeting, that she was handed the letter which she read, which told her she was dismissed, that she asked Mr Goble if he would reconsider and he said no. We find that there was no discussion at all of any performance issues at that meeting and that the claimant was given no opportunity to discuss or explain her performance at all. The meeting lasted seven to ten minutes.

139. We find that there is no evidence in fact that Mr Goble was considering dismissing the claimant at all before 12 February 2019. We find that, on the contrary, Mr Goble was pleased with the claimant's performance.

140. We do accept that by 14 February there was some annoyance about the quality of the photographs and Mr Goble considered there was an issue about vans being left unlocked. We find, and the respondents accept that a decision was taken that the respondent no longer wanted to employ the claimant and that, as she was coming up for two years continuous employment at which point she would gain protection rights for unfair dismissal, that she should be dismissed at once and that the contractual procedures would be dispensed with. This is set out in a letter dismissing her and in the response to her appeal, in very clear terms and Mr Crouch specifically states that the decision was that, rather than follow a lengthy and protracted procedure that she would be dismissed at once.

141. We find that whilst there may have been some minor performance concerns, that the respondent did not really believe that the claimant's performance was so poor in February 2019 that it was justified in dismissing her immediately. The reality is that the respondent decided that rather than give the claimant time to improve they would dismiss her before she gained two years continuous employment, protection from unfair dismissal, entitlement to redundancy pay other rights in respect of the contractual procedures in the handbook or indeed longer notice rights.

142. Whilst there may have been some concerns about poor performance we find as fact and this is relevant for the purposes of a wrongful dismissal, that they were not serious enough to have justified a dismissal for poor performance at that stage. The respondents had failed to give her any warning under the contractual procedures at all, they had failed to raise concerns about her performance on a variety of occasions and we reject their evidence that they had. The only mention ever of any discussion is on page 122 in the bundle which is 3 December meeting.

143. The claimant's performance was used in an excuse for dismissing her but part of the reason was a wish not to have to deal with performance issues at a later stage with a long drawn out process. Whilst we conclude that that is not fair to the claimant in the circumstances, we also find it is not reasonable. It is of course, not unknown in many businesses.

144. There is no evidence before us that the reason for this treatment was anything to do with gender but more importantly, we have seen no evidence and make no findings of fact therefore that this is different treatment. Whilst we find it is arguably unfair, this isn't an unfair dismissal claim.

145. We do find however, as set out below, that the decision to dismiss was in breach of the contractual processes.

146. We find no evidence that this employer did treat or would have treated a man in similar circumstances any differently. In the absence of any such evidence we have also considered whether or not there are findings of fact from which we could draw inferences and we find that there are not. Whilst we have found that Mr Goble made ill considered, childish and offensive remarks both in an open office and on WhatsApp, we are not drawing from that any conclusion that he had taken the steps in relation to dismissal on grounds that the claimant is a woman, or that he or the respondent generally, had an a discriminatory attitude consciously or unconsciously towards the claimant as a woman.

147. Whilst we are critical of the respondent's treatment of the claimant, we do accept that there was a reason for dismissing her when they did which was nothing to do with her being a woman but with everything to do with them wanting to get rid of an employer who was about to accrue employment rights and about whom there were some, we say minor but they may have felt differently, concerns about performance. We accept that there was a full explanation and just because it is one we consider to be unfair and unreasonable in this case, does not mean that it is discriminatory.

Breach of contract

148. In respect of wrongful dismissal, the contract sets out a disciplinary procedure at 14.3, which requires two working days' notice of a disciplinary hearing. That did not happen in this case.

149.

150. Section 14.6 of the contract refers to non-performance. We have heard no evidence from the respondent about the meaning of that term of the contract other than an assertion they believed they didn't have to follow it. We find that there are two types of behaviour covered in section 14.6. The first is minor misconduct and the second is non-performance of duties. We read non-performance as including poor performance or failing to perform at the required level. There would be no need for that second term if misconduct included non-performance for example.

151. In this case the respondent's list of alleged failings of the claimant were set out in the note which was given to her only after she had been dismissed and this is at page 168 of the bundle. We have looked at it and it includes things that it was alleged the claimant had not been doing. That we find is non-performance. We all agree and find as fact that the wording of the contract at 14.6 covers the concerns which the respondent say that they had.

152. 14.8 says, notwithstanding the provision in 14.6 that the employer reserves the right to depart, *if it is reasonable to do so and if the employee is not prejudiced by such departure*. This is not a case where there is misconduct and does not need to be considered. The respondents rely on the exception.

153. In the appeal letter of 11 March 2019, Mr Crouch states "the reason the decision was taken was poor performance over a period of time that you simply were not up to the job. I think what probably should have happened is that the previous occurrences of poor performance and discussions which we had with you should have been addressed formally and then your dismissal would not have been a surprise. The fact that you were approaching two years, rather than drag out a process the company took the decision to dismiss".

154. The evidence of Mr Davidson Bowman was that no-one at the respondents gave any thought as to whether or not it was reasonable to abandon the procedure in this case at the time the decision was made. They believed on advice that they could dismiss lawfully and did so.

155. It is right that the claimant cannot challenge the fairness of her dismissal because the dismissal took place before the claimant had two years' service.

156. However wrongful dismissal is a contractual remedy and here the claimant's contract provides that the process in respect of dismissal where performance is in issue, can only be departed from as set out, at the discretion of the employer in the circumstances set out.

157. We find that the exercise of that discretion requires some form of determination by the employer, before a decision is taken not to follow it, about whether or not it was reasonable to depart from the process in any given case and a consideration of potential prejudice to the claimant in the specific case. There was no such consideration by the respondent in this case.

158. The only explanation for not following the process is that the claimant was approaching two years' service and the employer wanted to dismiss before she gained employment protection to avoid a long drawn out process.

159. We find that this cannot possibly be considered to be reasonable in this case within the meaning of the contract or of no prejudice to this particular employee. This employee was within days of accruing two years' service, had

had no previous warnings about poor performance and whilst there may have been questions about her performance the reality, we find is that her performance was not poor enough to have justified a dismissal at that point without been given an opportunity to improve.

160. The avoidance of statutory protection cannot of itself, we say within this contractual term make it reasonable to depart from a procedure and in this case, there was clearly significant prejudice to the claimant of doing so.

161. First, she did not have the proper opportunity to explain any issues with her performance such as the fact that she was using her own phone to take photographs or second to show improvement against set targets or third, should she fail to do so and be dismissed, to have the benefit of the statutory employment protection.

162. We conclude therefore that the claimant is entitled to the benefit of the contractual procedure in 14.6 in respect of poor performance which requires a three-stage process prior to dismissal.

163. We find she wasn't given any of the three warnings or the two days' notice of a disciplinary hearing and that there was in fact no disciplinary hearing and therefore she was wrongfully dismissed.

164. We have looked at the handbook and note that there was a disciplinary procedure within it which is followed but only for those who have more than two years' service. It is not contractual, didn't apply to the claimant in this case because she didn't have the two years' service but, had she remained employed she would then have been entitled to a wholly different procedure.

165. We conclude as follows:

165.1. The respondent did not directly discriminate against the claimant on grounds of sex in respect of any of the allegations she made. These include non granting of compassionate leave;

165.2. Shouting at the claimant over the Sat nav issue;

165.3. Comments made by Mr Goble about the claimant not having been liked by her former line manager,

165.4. Comments made by Mr Goble that he could sack her at any time;

165.5. The appraisal of the claimant;

165.6. The emails sent to her and her male colleagues,

165.7. The decision to dismiss the claimant or the manner of her dismissal.

165.8. None of these incidents amounted to harassment on grounds of sex.

165.9. Mr Goble did set up a work based Whats App group and did add the claimant to it without her knowledge or consent,

165.10. Mr Goble did post a series of posts on Whats App, which did have the effect of harassing the claimant and the harassment was related to sex.

165.11. The claimant was wrongfully dismissed.

Remedy

166. Given our conclusion, we then proceeded to discuss remedy.

167. The parties agreed by consent to a figure for remedy in this case of £15,000.00 in respect of all the claimants losses.

168. Judgment that the respondent pay to the claimant the sum of £15,000.00 in respect of the wrongful dismissal and discrimination by reason of harassment.

_____

Employment Judge Rayner

_____

Date 2 December 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON
16th December 2020
By Mr J McCormick

FOR THE TRIBUNAL OFFICE