



EMPLOYMENT TRIBUNALS

Claimant: Mr D Martin

Respondent: Mansfield Pollard & Co Limited

Heard at: Leeds (via CVP) **On:** 10 and 11 December 2020

Reserved decision: 16 December 2020

Before: Employment Judge Licorish
Mrs L J Anderson-Coe
Mr T Fox

Representation

Claimant: in person

Respondent: Mr J Robinson (solicitor)

This has been a remote hearing. The parties did not object to the case being heard remotely. The form of the hearing was V (by Cloud Video Platform – CVP). A face-to-face hearing was not held because of the Covid-19 pandemic.

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. By consent, the claimant's complaint of harassment related to sexual orientation succeeds.
2. The claimant's complaint of direct discrimination fails and is dismissed.
3. A hearing to determine remedy in respect of the harassment complaint has been listed to take place by video on 22 March 2021, starting at 10am. A notice of hearing will be sent separately.

REASONS

1. The claimant started to work for the respondent limited company as an estimating team leader on 3 February 2020. The respondent terminated his employment with effect on 12 February 2020. The claimant essentially contends that he was dismissed because he witnessed homophobic banter between colleagues at the end of his first week in employment, and his line manager's attitude towards him changed thereafter to the extent that he was dismissed during the following week for unconvincing reasons.

2. By a claim form presented on 9 May 2020, following a period of early conciliation from 17 to 20 April 2020, the claimant complained of harassment related to sexual orientation and less favourable treatment because of sexual orientation (based on his dismissal). A further complaint of unfair dismissal was subsequently dismissed on withdrawal by a Judgment dated 22 July 2020.
3. The respondent denied the claimant's claim. Most importantly, it maintained that the claimant was dismissed because it had genuine concerns about his performance.

The hearing

4. During the hearing the Tribunal first heard evidence from the claimant. For the respondent we heard from Victoria Eades (head of sales and the claimant's line manager). Both of the witnesses' written statements were read by the Tribunal before the claimant gave evidence.
5. The claimant also attached to his witness statement an unsigned character reference from a former manager. We explained that we could not attach much weight to that statement on the basis that this person would not be giving evidence under oath, nor was he available to be questioned by the respondent or the Tribunal.
6. The Tribunal was also provided with an agreed bundle of documents, comprising 146 pages, to which we were selectively referred. References to page numbers in these Reasons refer to those in the bundle of documents before the Tribunal.
7. Submissions finished sufficiently late on the second day of the hearing with the effect that the Tribunal reserved its decision.

The issues

8. The claimant's complaints and basis for them were first identified during a preliminary hearing on 22 July 2020. A list of issues was agreed at the beginning of this hearing. As a result of our discussion and before the claimant gave evidence, the respondent conceded that the harassment complaint should succeed and a Judgment by consent given on that basis.
9. The issues which therefore remain to be determined by the Tribunal are:
 - 9.1 It is not disputed that the claimant was dismissed on 12 February 2020. Has the claimant therefore proved primary facts from which the Tribunal could properly and fairly conclude that he was treated less favourably because of sexual orientation? The claimant says:
 - 9.1.1 his performance at work was affected by the incident of harassment on 7 February 2020 and how the respondent chose to deal with it;
 - 9.1.2 Victoria Eades's previously positive attitude towards him changed following the incident, and the reasons she gave for his dismissal were "*absurd*".
 - 9.2 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for the treatment?

Factual background

10. Having considered all of the evidence, the Tribunal makes the following findings of fact, on the balance of probabilities, which are relevant to the

issues to be determined. Some of our findings are also contained in our later Conclusion to avoid repetition.

11. We would also say at this stage that the parties were in dispute about a number of matters. We have not tried to resolve each and every conflict in the evidence, but only those necessary to be able to determine the issues. In any event, we have found that many of those matters were in fact a difference in opinion and perception, particularly in respect of the claimant's performance during the few days that he was employed by the respondent.
12. Where possible, we have also relied upon contemporaneous evidence which is more likely to indicate what was said or done at the relevant time, rather than witness statements prepared with the benefit of hindsight. To this end, we found the claimant to be a consistent and candid witness. In particular, his recollection of events and chronology matched the account he gave to the respondent in February 2020 during a grievance fact-finding interview. He also readily made appropriate concessions not only in his written but also in his oral evidence.
13. By contrast, Victoria Eades's statement lacked significant detail. As a consequence, she gave material oral evidence which was never put to the claimant. We accordingly treated that additional evidence with caution. It further transpired during her evidence that a statement she had produced for the respondent in February 2020 (also as part of the grievance fact-finding investigation) had not been disclosed. We go into more detail about this, and explain how these matters impacted upon our decision-making, below.
14. The respondent is an engineering limited company which designs, manufactures, installs and commissions a range of heating, ventilation and air conditioning (HVAC) systems. In January 2020 it engaged the claimant (via a recruitment agency) as an estimating team leader in its presales department, following a telephone and face-to-face interview. Essentially the claimant was employed to take over part of Victoria Eades's role in this respect. She was the respondent's head of sales and became the claimant's line manager. It is not disputed that the cost and design estimating process was and remains critical to the successful operation of the respondent's pre-sales department.
15. By way of background, the claimant stated that he was told by other employees during his employment that the respondent's previous managing director had left at short notice at Christmas 2019, but no one knew fully why: *"There has been a very recent attempt at culture change and many of the key roles within [the respondent] had been replaced by new employees."* In response to the Tribunal's questions, Victoria Eades explained that this process had in fact begun earlier in around 2018, when she joined the respondent as head of customer service. At that time, there was a recognition that the culture within the respondent was *"not great"*, in that there was a *"bullying mentality"* among certain directors. As a result, those directors eventually left the respondent and a new managing director appointed in January 2020 was encouraged to implement changes in this respect.
16. Victoria Eades also explained to the Tribunal that, since joining the respondent, she had put considerable effort into building a cohesive pre-sales team. Indeed, the job description for team leader's role required the post holder to *"continue to build a unified and fully engaged team"* (page 114). Mrs Eades also assumed that in terms of filling the new role the respondent was unlikely to find a candidate who had both a technical HVAC background and what she described as *"people management"* skills. In the circumstances,

she decided to offer the claimant the role because at interview he had demonstrated the latter. However, she also explained to the Tribunal that at the time she was uncertain about how well the claimant would fit in with the existing team, but was nevertheless advised to “*give him a go*”.

17. During both of his interviews, the claimant felt sufficiently confident to disclose that at the beginning of January 2020 his husband had had a serious accident. At that time his husband remained in hospital, but would be discharged at some point, following which the claimant would become his primary carer. Victoria Eades explained to the Tribunal that during his first interview she had initially raised a concern about the claimant’s ability to commit to a demanding role, most importantly because he had spent only a short time in his previous job. It was at that point that the claimant explained his personal circumstances as his reason for leaving. He recalls that Mrs Eades offered to help in this respect if he joined the respondent. During his second interview, the claimant also discussed his personal circumstances with the respondent’s HR manager as well as Mrs Eades. In cross-examination, the claimant confirmed that references to his “*personal circumstances*” did not mean his sexuality, but that his husband had been injured in a recent accident.
18. The claimant’s employment was subject to a six-month probationary period (page 27). Both parties understood that it would take the claimant between three and six months for him to understand the respondent’s business, procedures and systems. The claimant stated that he intended to “*hit the ground running*” in this respect.
19. The claimant’s agreed hours of work were 8:30am to 5:00pm Monday to Thursday, with a 4:30pm finishing time on Fridays. He was also required to work “*such additional hours as [would be] necessary*” and opted out from the 48-hour limit on the working week as defined by the Working Time Regulations (page 28).
20. The claimant’s department was situated at one end of a long open-plan office. Victoria Eades explained to the Tribunal that the room contained 12 rows of 2 desks running down the middle, and a bank of desks running down each side. She sat to the claimant’s left. The claimant’s department was at the “*bottom*” of this space, meaning that all of the other desks stretched out in front of them.
21. The claimant started work on Monday 3 February 2020. The first week comprised a timetabled induction period, during which the respondent provided what was described to be an “*overview*” of its business via a number of sessions. The Friday was set aside for the claimant to hold informal meetings with the six members of his team (pages 42 to 47). The claimant attended the induction sessions with another new starter, a business development manager (BDM) who had worked for the respondent a few years previously. During his first week of employment, the claimant disclosed his personal circumstances to the new BDM because they “*spent considerable time together*”. He did the same during an induction session with the respondent’s quality control manager. During a later session, the respondent’s marketing manager told the claimant that “*something was being said*” about him, but that he was unaware of the details.
22. On Tuesday 4 February 2020, the claimant also attended an evening meal with Victoria Eades, together with the respondent’s managing director, head of projects, business unit manager, marketing manager and the new BDM. In

the event, the claimant had to leave early after receiving a message about his husband. The claimant's impression was that the managing director seemed to understand why he had to go. Mrs Eades confirmed to the Tribunal that she had indeed explained the claimant's personal circumstances to the managing director in anticipation that he might need support during his employment (for example, time off for medical appointments). The claimant says that he subsequently had an in-depth conversation with the managing director on 6 February 2020, because he wanted to apologise personally for leaving the meal when he did.

23. Generally during his employment, the claimant arrived for work approximately an hour earlier than required. He says that he was eager to learn and would rather have been an hour early than one minute late. He also told Victoria Eades that he was getting to know the morning traffic.
24. Victoria Eades maintains: "*From day one the claimant struggled with the role. He complained that it was too intense ... [the new BDM] went through the same [induction] process ... but made no complaints about it.*" The Tribunal was not persuaded by that evidence. Having observed the claimant, we consider it highly unlikely that he would have "*complained*" at all, let alone on his first day in a new job.
25. However on Wednesday 5 February 2020, the Tribunal accepts that the claimant did talk to Victoria Eades about the amount of information he was trying to retain in terms of the respondent's systems and processes in order to try to get up to speed as quickly as possible. He remembers this as a "*passing comment*" and he was not daunted by the prospect. He also recalls that Mrs Eades tried to put him at ease, reassuring him that the induction week was intended as an overview and that he was "*not expected to take everything in*". He further remembers that from around this time some negative comments were made by other employees in passing conversation, including "*If your face fits ...*". In cross-examination, he summarised the subject matter of these comments as relating to "*turnover of staff, the attitude of the workplace – all quite disparaging*".
26. It is also not disputed that on Thursday 6 February 2020, Victoria Eades gave the claimant a congratulations card, with the message: "*Great start! I look forward to seeing your impact on the team very soon!*" Mrs Eades explained to the Tribunal that at that point she had some misgivings about the claimant's people management skills, but did not want him to feel "*alienated*" because she usually sent such a card to everyone, including the new BDM. In any event, the Tribunal is satisfied that by that message Mrs Eades dropped a heavy hint for the claimant. Put simply, she wanted to see him making an impact on his team much sooner rather than later. The Tribunal accepts, therefore, that (rightly or wrongly) Mrs Eades expected the claimant to bond with his team and show leadership qualities from the outset.
27. Later that day, the new BDM referred to the claimant's personal circumstances during an off-site visit with the respondent's operations director. The new BDM later apologised because he realised that he had divulged information about the claimant without his permission. The claimant accepted the apology, but says that the incident had made him feel "*a touch uncomfortable*".
28. On Friday 7 February 2020, the claimant proceeded to hold informal meetings with the majority of his team. During the early afternoon, he was working at his desk when he heard loud laughter emanating from the other end of the

open-plan office, next to the business unit manager and quality control manager's desks. He then heard the head of projects repeat a comment made by another employee to the effect that the young man who had drowned in Michael Barrymore's swimming pool had done so "*because he had a bum full of water*". The laughter went on for some time. The Tribunal accepts that the claimant was horrified, and offended by that comment and the ensuing laughter.

29. As the laughter continued, the claimant asked a member of his team sitting in front of him to confirm what had been said. The estimator repeated the comment, apparently "*unperturbed*". At that point, the claimant says that Victoria Eades jumped out of her chair and went down the far end of the office, where "*she ushered several people*" into a meeting room. He says that they were in the room for a brief amount of time, following which "*she quietly glided back to her desk*".
30. Victoria Eades's recollection is different. She says that she looked up when she first heard loud laughter, and thereafter saw and heard another employee make the offending comment. As a consequence, she left her desk, told the group that the comment was inappropriate, and called the head of projects into a meeting room. She repeated her views, but also told him that the claimant was gay and might find such comments "*offensive*". She then spoke to two other heads of department who had been part of the offending group. She also told the HR manager and managing director what had happened. She thereafter had no further involvement in the matter.
31. In the circumstances, we accept the claimant's chronology because it matches that he gave during his grievance fact-finding interview in February 2020. The only contemporaneous evidence we have in terms of Mrs Eades's recollection is contained in the grievance outcome letter, which simply concludes that she dealt with the matter "*swiftly and in line with company policy*" (page 81). As we have explained, Mrs Eades's version of events written in February 2020 was not in the bundle of documents before us. In any event, the Tribunal is satisfied that once Mrs Eades became aware of what had been said, she reacted and tried to limit any damage that had been done.
32. It is not disputed that when she returned to her desk, Victoria Eades did not speak to the claimant about what had happened.
33. The Tribunal accepts that the claimant was considerably destabilised by the incident, largely because he was now worried about having to work with colleagues who were homophobic. In particular, the head of projects had led one of his induction sessions and was present at the evening meal. In cross-examination, the claimant explained that he also thought that the apparent lack of concern of the team member who confirmed what had been said suggested to him that the others would consider the comment in the same way. He also began to worry that he was in fact being set up to fail.
34. Towards the end of the day, the claimant met with Victoria Eades to share his thoughts, feelings and views on his first week in employment. At times, he recalls her sitting quietly looking at him. He thought by this that she was trying to get him talk about the incident, but he said nothing as he did not want to "*upset the apple cart*" – that is to say, jeopardise his position. During their meeting, Mrs Eades also told the claimant that he needed to prepare for second interviews for an estimator vacancy taking place on the following Monday and Tuesday.

35. The claimant says that he had explained during his own recruitment process that he had only limited experience of interviewing (namely, cleaning staff as a facilities manager). He therefore reminded Victoria Eades of this as he understood that he was to lead the second interview.
36. From the claimant's evidence, the Tribunal is also able to conclude that there was some discussion surrounding an effective clash of expectations. The claimant recalls that Victoria Eades told him that he "*was to manage the estimating team, not ... to estimate*", and that he had been appointed for his people skills, not his technical ability. In response to the Tribunal's questions, Mrs Eades says that she in fact told the claimant that during the estimator interviews he needed "*to appear to be a leader*" on the basis that he would be managing the successful candidate. She was also frustrated with the claimant because he seemed to be more concerned with learning what estimators do, rather than his role as a team leader. Finally she advised him that if he was worried about the estimator interviews, he should "*go online, educate [him]self and get some guidance*".
37. Over the weekend, the claimant resolved to move past what had happened on the Friday because he needed a steady income while his husband was incapacitated. However, on Monday 10 February 2020 he knew he had a difficult day ahead owing to the first estimator interview. Also during that morning the claimant completed a task set from him by Victoria Eades, following which she "*high fived*" him. The claimant felt embarrassed and she immediately apologised for her actions.
38. The claimant had prepared a list of interview questions over the weekend, which Victoria Eades reviewed. She told the claimant that they were "*OK*". She explained to the Tribunal that they "*weren't great ... they had been taken straight from the internet, but they were a start*". He was given copies of the candidates' CVs, but not a job description for the role or any notes from the first interviews. The claimant, Mrs Eades and the HR manager interviewed the first candidate that same day.
39. After Victoria Eades had left for the day at around 4:30pm, the claimant had what he described as a "*lengthy conversation*" with the HR manager. Among other things, she talked about how to read people and identify who might be a "*flight risk*", and she advised him to take notes during each interview. She also told the claimant that he was already putting in too many hours and would "*burn out*" very quickly. At that point, she suggested to the claimant that he should think about asking to change his hours.
40. The HR manager also explained how she generally went about making herself approachable, although her primary loyalty rested with the respondent rather than its employees. The claimant considered that her tactics showed a certain "*level of deceit*". In cross-examination, he confirmed that he did not feel targeted specifically in this respect, but was concerned about the HR manager's general attitude towards the respondent's employees.
41. Victoria Eades describes this conversation as "*additional training*" given to the claimant. However, the Tribunal accepts that from the outset the claimant was open about his lack of experience as an interviewer, and the HR manager was (among other things) simply providing guidance as to how he might handle the next estimator interview.
42. As a result of that conversation, the claimant concluded that he had to be guarded, as he realised that the HR manager was probably also analysing

him and his behaviour. Their discussion continued to the extent that he left work at 5:45pm. He was therefore unable to finish a task which Victoria Eades had told him to complete before he left for the day.

43. On Tuesday 11 February 2020, the claimant once again arrived at work an hour early. Victoria Eades was out of the office during the morning. The claimant was able to finish the task set for him by Mrs Eades. Having thought about his hours overnight, he also emailed Mrs Eades and the HR manager, and an agreement was reached to take effect from the following Monday, 17 February 2020.
44. While Victoria Eades was out of the office, the new BDM telephoned the claimant. The claimant was unsettled by the call because the new BDM asked about "*personal matters*" and the claimant struggled to make himself heard (because the new BDM was driving) without drawing attention to himself in the open-plan office. It also occurred to him that Mrs Eades might be out with the new BDM (although Mrs Eades insisted to the Tribunal that she was not). Nevertheless, the claimant thought that the telephone call might be another "*test*". He was aware that when she was in the office Mrs Eades closely monitored his conversations, because she would always comment on the way he had performed.
45. Also during that morning, the claimant interviewed another estimator candidate with the HR manager. During their subsequent discussions, he developed the impression that she and Mrs Eades had already decided who should be recruited after the first interviews. Mrs Eades told the Tribunal that she had an idea about who the front runner was, but the decision was made only after the second interviews.
46. While Mrs Eades was away from the office, the claimant also declined to attend a quality control training session with his team. In cross examination, he said that he was using his initiative in this respect. He wanted to spend the time getting up to speed with managing the sales inbox because other members of his team had told him that they were "*desperate to get rid of*" that responsibility. He thought it sensible because he had attended a quality control overview session only the week before. He also needed more time to prepare for the second estimator interview. Victoria Eades explained to the Tribunal that when she returned to the office the quality control manager told her that she was disappointed by the claimant's non-attendance. Mrs Eades thought that it would have been an ideal opportunity for the claimant to build a relationship with his team.
47. Victoria Eades further explained to the Tribunal that the claimant specifically "*refused to follow instructions from me*" to the extent that she had arranged further sales inbox training for the claimant with a member of his team also during that morning. The claimant maintains, however, that in the event the session "*got put back*" because other matters intervened. Mrs Eades's understanding from the team member is that the claimant simply failed to keep the appointment. He did not warn the team member that it would not be going ahead. When the team member sought clarification, the claimant explained that he was "*doing more studying on recruitment*".
48. The claimant also recalls that when he tried to talk to Victoria Eades and the HR manager about the changes to his working hours later that day, "*their expressions didn't correspond with the words said*". In cross-examination he explained that both were "*deadpan ... paying lip service*". In response to the Tribunal's questions, Mrs Eades said that they were in fact bemused: they

had already agreed to his request, but the claimant chose to interrupt their meeting in any event.

49. In response to the Tribunal's questions, Victoria Eades said that on 11 February 2020, she arrived at the office at around 12 noon and was in a meeting between 1:00 and 4:00pm. She discovered that the claimant had not attended the quality control or sales inbox training before she went into her meeting. The HR manager then told her that she was disappointed with the claimant's performance during the estimator interview because he did not put into practice any of her advice. In Mrs Eades' view, even if the claimant was nervous he could have at the very least followed the HR manager's advice and taken notes during the interview.
50. Victoria Eades told the Tribunal that she therefore discussed her concerns with the HR manager. Essentially she thought: "*Is this going to work?*" In Mrs Eades' view, there were "*too many alarm bells*". The claimant appeared to her to be overwhelmed and nervous during his first week. He was now refusing to follow instructions or guidance, and she had assumed that he would be able to "*pick things up*" more rapidly. He also appeared to be alienating rather than bonding with his team. Another estimator had told her that in his opinion the claimant "*needed to step up*".
51. Victoria Eades therefore went to see the managing director because she was "*scared that [the claimant] was going to jeopardise the team's confidence*". The managing director agreed with Mrs Eades's judgement on the basis that the respondent needed to "*cut [its] losses now*". Mrs Eades recalls that she arrived at her decision between 5:00 and 5:30pm on 11 February 2020.
52. On Wednesday 12 February 2020, the claimant arrived for work at around 7:45am. Victoria Eades was at her desk in conversation with the marketing manager. The claimant says that their demeanours changed when he said good morning. Shortly after he had started to work at his desk, Mrs Eades asked to meet him in the boardroom "*for a quick 5 minutes*".
53. The claimant was cross-examined on his account of that meeting on the basis that it "*neatly summarised the respondent's reasons*" for his dismissal. Essentially, Victoria Eades told the claimant that his contract was being terminated because "*we haven't got time to train you*", he was "*not engaging with the team*" and he was "*not meeting expectations*". The claimant recalls that he said very little because "*he was totally unprepared*". He was, however, under the impression that a decision had been made and nothing he said would change it.
54. In her witness statement, Victoria Eades recalled that the claimant did not appear surprised and said that he agreed with her decision. We were not persuaded by that account. Based on the claimant's version of events, the Tribunal is satisfied that the claimant may have appeared to have been accepting of the decision but did not expressly agree with it. Most importantly, in response to the Tribunal's questions Mrs Eades said that the claimant did in fact look surprised. She also recalled telling her husband about the claimant's reaction later that day, but only to the extent that the claimant "*didn't challenge us*" (meaning the decision to terminate his contract).
55. By email later that day, the claimant asked Victoria Eades for "*a summary & explanation for the reasons behind termination of my contract at short notice*" (page 52). By letter also dated 12 February 2020 but emailed to the claimant on 13 February, the HR manager confirmed the effective date of the

claimant's dismissal. The reason was stated to be: "*you have not met the required expectation for the role*" (page 51). The claimant says that his recruitment agent also obtained feedback from the respondent, only to the extent that "*they didn't like all the additional hours I was putting in the office*". In response to the Tribunal's questions, Victoria Eades stated that she personally was not asked to provide any feedback in this respect.

56. By email on 14 February 2020, the claimant wrote to the HR manager on the basis that he wished to appeal his "*unfair dismissal*" (page 55). He explained to the Tribunal that his first two points were raised in response to his conversation with Victoria Eades on 12 February 2020. Among other things, he stated that:

"1. *It is absurd to suggest that I was not engaging with the Team after two days of working. The first week being induction.*

2. *With regards to additional working hours. This is positive, both for [the respondent] and myself, to become proficient in the role quickly.*

3. *Prior to commencing employment ... I disclosed my sexuality. A grossly inappropriate comment [was] made on 07/02/20, followed by several male employees laughing disruptively loud. I am offended by this comment voiced, especially in an open working environment. I believe a underlying homophobic current exists, regardless of [the respondent's] policies. Vicky Eades raced to escort the perpetrators into the far meeting room exacerbates this, when knowing I heard what was said."*

57. The respondent treated the claimant's email as a grievance on the basis that he had insufficient service to be able to claim unfair dismissal (page 56). A fact-finding meeting eventually took place off site on 27 February 2020. (pages 67 to 72). The respondent's then finance director chaired the meeting.

58. The HR manager was expressed to be the "*notetaker*" in the respondent's minutes of the meeting, but she also participated in it, answering some of the claimant's allegations in respect of his working hours and asking questions at specific points. Most importantly, the discussion which took place between the claimant and HR manager about his working hours on 10 February 2020 was referred to. The HR manager confirmed: "*it was a comment to look after himself especially with what was going on in [the claimant's] personal life and asked [the claimant] if he had considered requesting to change his hours to which [the claimant] put in a request the following day*" (page 68).

59. Most importantly, during the meeting the claimant stated:

59.1 He was led to believe that he would be given between three to six months to engage with his role, but after two substantive days in post Victoria Eades told him that there was no time to train him.

59.2 During his first week in post, the HR manager had questioned why he was arriving early for work as "*she did not want [the claimant] to burn out*". As a result it was eventually agreed that owing to his personal circumstances his hours of work would change from 17 February 2020.

59.3 He had been open and honest about his lack of interviewing experience, but was made lead interviewer for the estimator vacancy and was given no notes from the first interviews. However, his performance during the second interviews was not specifically referred to by Mrs Eades as a reason for terminating the claimant's employment.

- 59.4 He had felt comfortable working at the respondent up until the incident on 7 February 2020. However, during his induction other people had told him what the respondent used to be like.
- 59.5 The incident on 7 February 2020 had impacted upon how he felt about the respondent and the reasons for his dismissal. He believed that the incident and the termination of his employment were “*interlinked*”.
60. By email on 17 March 2020, the finance director apologised to the claimant for the “*slight delay ... due to remote working (Coronavirus) and absence*” in terms of concluding her investigation and providing a grievance outcome (page 77).
61. By letter dated 31 March 2020, the finance director rejected the claimant’s grievance following what was stated to be “*a comprehensive investigation*” (pages 80 to 82). Most importantly:
- 61.1 The new BDM had stated that he had no concerns about the induction process, whereas the claimant expressed concerns about the intensity of the process on “*day 1*” .
- 61.2 Throughout her determination, the finance director referred to matters that had been “*noted*” by the respondent or brought to the claimant’s attention. For example, the investigation found that on 5 February 2020, “*HR felt it necessary to refresh your understanding of your responsibilities as a team leader*”. In response to the Tribunal’s questions, the claimant maintained that such matters had not been formally raised with him prior to his dismissal.
- 61.3 The claimant had been observed failing to engage with his team, including not greeting them in the mornings or engaging them in conversation. During the second week of his employment, members of his team and the respondent’s senior leadership team expressed reservations about his abilities in this respect.
- 61.4 He did not readily appreciate the implications of one of his team being off sick.
- 61.5 He chose not continue sales inbox training with a team member as instructed by Victoria Eades.
- 61.6 He declined to attend a team training session, and appeared to be insensitive to the importance of attending and the opportunity to interact with his team.
- 61.7 He was given guidance on interviewing for the estimator vacancy but failed to follow that guidance thereafter.
- 61.8 When the claimant was dismissed, he told Victoria Eades that he agreed with her decision and did not appear to be surprised.
- 61.9 Although the incident on 7 February 2020 had been “*wholly unacceptable and in direct conflict with the core values*” of the respondent, it had been dealt with “*swiftly*” by Mrs Eades, and appropriate action had been taken “*on the back of [the finance director’s] investigation into the incident, including formal disciplinary proceedings*”.
62. By email on 6 April 2020 the claimant effectively appealed the grievance outcome, most importantly on the basis that the timescales discussed at interview in terms of becoming “*fully conversant*” with his role had been disregarded and that no one should be expected to work in an environment in

which discriminatory comments are made (page 83). By letter dated 9 April 2020, the respondent refused to take that appeal forward. The finance director maintained that it had followed its grievance procedures and the claimant had presented no new evidence in support of his complaint (page 87).

63. The claimant presented his claim form on 9 May 2020. Between 9 July and 7 August 2020, the respondent held disciplinary hearings and issued verbal warnings to four employees involved in the incident on 7 February 2020, including the head of projects (pages 88A to 88F and 89A to 89B).

The relevant law

64. Sexual orientation is a protected characteristic under section 4 of the Equality Act 2010 (EqA). Section 12(1) provides that “*Sexual orientation [includes] a person’s sexual orientation towards ... persons of the same sex*”.

65. Section 13 of the EqA defines direct discrimination:

“(1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

66. Section 39(2) of the EqA states:

“An employer (A) must not discriminate against an employee of A’s (B) – ... (d) by dismissing B”.

67. To succeed in a claim for direct discrimination, the claimant must therefore prove that he was subjected to certain treatment; he was treated less favourably than a comparator was or would have been treated in the same circumstances or in circumstances that were not materially different; and, in the absence of any explanation by the respondent, that the less favourable treatment was because of sexual orientation, or otherwise such that the Tribunal could draw an inference that the treatment was tainted with discrimination.

68. Less favourable treatment must be established by reference to an actual or hypothetical comparator. According to section 23(1) of the EqA, on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. However, even if such treatment did occur, it does not automatically follow that, on the face of it, discrimination also took place. The claimant must also show that he was treated the way in which he was because of a protected characteristic – **Zafar v Glasgow City Council [1988] IRLR 36 HL**.

69. In the alternative, the Tribunal may simply ask why the claimant was treated in the way that he was. If at least part of the reason was the claimant’s sexual orientation, then it is likely that a comparator would have been treated differently and discrimination will be made out – **Shamoon v CC of the Royal Ulster Constabulary [2003] IRLR 285 HL; Aylott v. Stockton on Tees Borough Council [2010] IRLR 994 CA**

70. In determining whether the claimant has discharged the burden of proving his case, the Tribunal is entitled to consider all the evidence put forward by the parties (**Birmingham City Council v Millwood [2012] EqLR 910 EAT**). In this respect, the claimant must prove something more than a difference in status (in this case, sexual orientation) and a difference in treatment for the

burden to shift (**Madarassy v Nomura International plc [2007] IRLR 246 CA**).

71.If the claimant discharges the burden, the Tribunal must hold that discrimination took place unless the respondent can prove that it did not contravene the EqA (section 136).

Conclusion

72.The respondent's representative made a number of oral submissions on the second day of the hearing. The claimant asked us to take into account written comments on the respondent's case attached to his witness statement (marked as C1, comprising 29 paragraphs). We have considered the parties' submissions with care, but do not repeat them in full. Accordingly, we summarise their submissions below where appropriate. We now apply the law to our findings of relevant facts in order to determine the identified issues.

73.In determining the claimant's complaint, we have also taken into account the general principles for Tribunals to consider when deciding what inferences of discrimination may be drawn. During the hearing, we explained to the parties that the following principles were identified in **Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11 EAT**:

73.1 It is very unusual to find direct evidence of discrimination.

73.2 It is essential that the Tribunal makes findings about any primary facts that are in issue so that it can take them into account as part of the relevant circumstances.

73.3 The Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference.

73.4 Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and overall probabilities.

73.5 The Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment.

73.6 If it is necessary to resort to the burden of proof in this context, section 136 EqA provides that where it would be proper to draw an inference of discrimination in the absence of any other explanation, the burden lies on the alleged discriminator to prove that there was no discrimination.

74.We have explained that having clarified the issues and before we heard any evidence, the respondent conceded that the claimant's complaint of harassment based on the incident on 7 February 2020 should succeed and a judgment by consent is made on that basis.

75.Turning to the direct discrimination complaint, the treatment complained of by the claimant is his dismissal. We therefore consider whether the respondent thereby treated the claimant less favourably and, if so, whether the difference in treatment was because of the claimant's sexual orientation. The claimant essentially argues that the respondent's portrayal of his attitude while in its employment is entirely at odds with his experience, and he was dismissed

only a few days after offensive comments relating to sexual orientation were made by other employees. Put simply, he had been open with a number of his colleagues on the basis that he was in a same-sex relationship. In cross-examination, he explained that he suspected that the respondent was concerned that him "*being gay was going to create an atmosphere*". To ensure that the business would continue to run smoothly, it was therefore "*easier to get rid of*" him rather than the perpetrators.

76. The respondent submits that the claimant's suspicions are "*complete nonsense*" and contain "*an element of paranoia*". It was pure coincidence that his dismissal took place shortly after the incident on 7 February 2020. Most importantly, it would be inappropriate for the Tribunal to draw any inferences from the evidence because Victoria Eades was a "*credible and reliable witness*".

77. The Tribunal starts from the premise that it is very unusual to find direct evidence of discrimination. The Tribunal also recognises that discrimination may be unconscious as well as conscious. It is therefore open for us to decide that the proper inference to be drawn from the evidence is that, even though the employer did not realise it at the time, sexual orientation was an effective reason for why it acted as it did.

78. On the face of it, and based on our findings of fact, we conclude that the following matters are sufficient for the burden to shift. At this stage, for the avoidance of doubt we have also drawn inferences from our findings as to inconsistencies in (rather than the substance of) the respondent's evidence, although for clarity we refer to the substance of that evidence below.

78.1 In her written statement, Victoria Eades referred us to a bullying and harassment and equal opportunities policy as evidence of the respondent's "*strong values*" (pages 126 to 145). Each document states: "*Individual managers are responsible for ensuring that this policy is applied within their own department or area.*" The bullying and harassment policy defines unwanted conduct as "*lewd comments, jokes, banter ... which refer to a group or individual's ... sexual preference*".

78.2 Nevertheless, there is evidence which indicates that some of the respondent's managers and/or heads of department considered it acceptable to participate in and/or endorse offensive homophobic "*banter*" initiated by a team member, and in an open-plan office. A member of the claimant's team also appeared to be undisturbed by such comments and behaviour. Further the claimant was clearly in Mrs Eades's thoughts at the time of the incident in that she took it upon herself to disclose the claimant's sexuality to one of the perpetrators. Notwithstanding this, she decided not to speak to the claimant about the incident when she had the opportunity to do so in a private meeting with him later that afternoon.

78.3 In her written statement, Mrs Eades stated that the delay in disciplining those involved in the incident had been owing to disruption caused by the Covid-19 pandemic. However, in cross-examination and in response to our questions, she stated that she was in fact unable to explain exactly why the perpetrators were disciplined some time after the claimant commenced Tribunal proceedings because she had not been involved in that disciplinary process. In any event, the claimant's grievance outcome letter confirms that formal disciplinary proceedings did not start before the finance director's investigation into the claimant's

complaint, but were initiated “*on the back*” of it (quoted at paragraph 61.9 above).

78.4 The Tribunal is satisfied that the timing and the way in which the claimant was dismissed was brutal, and the proximity of the decision to the incident of harassment calls for an explanation.

78.5 At the time, the reasons for dismissal offered to the claimant following his request were circumspect and contradictory. In particular, the HR manager advised the claimant to request a change in his hours, which was later put into effect. However, in response to our questions Victoria Eades said that she thought it “*strange*” that such a request had been made so early in the claimant’s employment. Furthermore, Mrs Eades insisted that she expected the claimant to show leadership and work autonomously, but appeared to be irritated when he tried to use his initiative or failed to follow her “*instructions*” or any advice.

78.6 In her written statement, Victoria Eades said that members of the claimant’s team had approached her during his second week of employment to express their concern about his capabilities. However, in response to the Tribunal’s questions she said that she in fact asked some of the team for their opinions. She also added that the new BDM had told her that the claimant appeared to be “*struggling*” during his induction period.

78.7 Also in her written statement, Mrs Eades cited the claimant’s team witnessing the claimant using Google to find information on how to interview people as a reason for their lack of confidence in him. However, in response to the Tribunal’s questions she stated that she had in fact advised the claimant to go online to “*educate*” himself in this respect.

78.8 We do not accept that the claimant was “*paranoid*” in terms of his suspected reasons for his dismissal, as described by Mrs Eades during her evidence and the respondent’s representative. On the respondent’s own case, a number of his colleagues were in fact talking about him in disparaging terms only a few days into his employment.

78.9 Finally, the finance director’s grievance outcome referred to Victoria Eades’s “*notes*” relating to the claimant’s time in post. The respondent’s representative initially told the Tribunal that the finance director had since left the respondent’s employment, and it had been unable to locate the documents relating to the investigation. However, Mrs Eades thereafter explained to the Tribunal that as part of the investigation she was asked to provide a statement, which she emailed to the finance director and HR on 19 February 2020. She said that she had not been asked to look for a copy of that statement.

79. We therefore find on balance that there is sufficient evidence before us to be able to conclude that the burden shifts to the respondent in this respect.

80. The Tribunal therefore next considers whether the respondent has proved a non-discriminatory reason for the claimant’s treatment. We must ask ourselves whether the respondent has given an adequate alternative explanation for its conduct. That determination includes looking at who the decision makers were and whether any involvement infected all or some of the process. Ultimately, the Tribunal must consider whether the respondent has shown a complete explanation for any treatment. Most importantly, that

explanation might not be objectively reasonable, but must be untainted by considerations of sexual orientation.

81. The respondent submits that, most importantly, the claimant was dismissed because he failed to meet his line manager's "*exacting standards*". It was a hard but the right commercial decision. Ultimately Victoria Eades was concerned that the claimant would destabilise the team she had built up over the previous two years. She became frustrated with him in this respect. Her decision was ultimately to do with the fact that she did not have the time to "*get the claimant up to speed*". The timing of the incident was unfortunate, but there was no suggestion that the decision (rightly or wrongly) to dismiss the claimant was predicated upon his sexuality.

82. In the circumstances, we find that the respondent has provided a complete and adequate alternative explanation for its treatment of the claimant. Most importantly:

82.1 Generally, based on what we read and heard, we are satisfied that there was a clear mismatch in expectations between Victoria Eades and the claimant. The team leader's role was new and involved Mrs Eades effectively handing over part of her job. Victoria Eades held firm views about the way in which the new role should be done. We therefore accept that she was possessive of her team and what she had achieved to date, and indeed had "*exacting standards*" in this respect. In our view, the new BDM's experience cannot be compared because he had worked for the respondent previously and was recruited into an existing role.

82.2 For example, during his first week the claimant thought that he should concentrate on the induction process, whereas Mrs Eades expected him to start bonding with his team during his lunch break, and at the beginning and end of each day. We have found that Mrs Eades gave an indication of her expectations in this respect in the congratulations card she sent to the claimant and in the private meeting she had with the claimant at the end of his first week of employment.

82.3 As we have already explained, this led to an inevitable tension between Mrs Eades wanting the claimant to "*lead*" with minimal supervision, but also to follow instructions and advice. Mrs Eades had also been uncertain about whether to recruit the claimant in the first place, but had decided to "*give him a go*". We are satisfied that the claimant was never made explicitly aware of the experimental nature of his appointment. He was told only that he had been recruited for his people management skills rather than technical ability.

82.4 The claimant also reasonably assumed that Mrs Eades's duties would effectively be handed over to him once he was up to speed with each element. In his view, during his employment Mrs Eades was effectively still managing the estimators. However, in cross-examination Mrs Eades explained that she was concerned about the claimant's lack of sense of urgency from the outset (for example, the implications if a team member was off sick). He was also taking too long to complete what she considered to be "*simple tasks*".

82.5 Against this context, Mrs Eades explained to the Tribunal that the claimant appeared overwhelmed during his first week. We treated that opinion with caution. However, we accept that the claimant would have been nervous starting a new job and wanting to make a good impression,

the timetable for his first week was indeed “*intense*”, and he was unsettled and upset by the incident of harassment at the end of his first week of employment.

82.6 During his second week, the claimant was thereafter almost immediately required to perform to specific standards as an interviewer, despite being open about his lack of experience in this respect. In Mrs Eades’s view, he was also not sufficiently interacting with his team, and to his team he appeared to lack confidence. Otherwise, his attempts to take the initiative and prioritise his workload backfired in terms of the quality control and sales inbox training sessions.

82.7 As a result, we are satisfied that Victoria Eades (rightly or wrongly) rapidly lost confidence in her decision to try out the claimant in the team leader’s role and did indeed decide to cut her losses. We do not fault the claimant in this respect: he was unknowingly put into a difficult and precarious position.

82.8 In response to the Tribunal’s questions, Mrs Eades also explained that part of her decision was based on the fact that it was “*not sitting right [the claimant] wanting to change his hours*”. We have explained that we find this surprising, in view of the fact that the HR manager initially suggested the possibility to the claimant. Nevertheless, the suggestion and request came about partly because of the claimant’s “*personal circumstances*”. This was not to do with his sexuality, but because of the consequences of his husband’s accident. There was no suggestion that Mrs Eades was disturbed by the request because it came from an employee in a same-sex relationship.

82.9 We further accept that although the claimant was unsettled by the incident of harassment, the message in Mrs Eades’s congratulations card in terms of his performance as a team leader predates that episode. Mrs Eades also reacted once she heard what had been said. She was not passive, unlike the claimant’s team member.

82.10 Victoria Eades was in fact candid in response to the Tribunal’s questions regarding the aftermath of the incident. She admitted (and we accept) that she did not raise the matter with the claimant because she was “*out of her depth*” and “*embarrassed*”, not having dealt with such situation before.

82.11 Finally, we are satisfied that the timing of the disciplinary process in respect of the perpetrators involved in the incident is more relevant to the respondent’s intended defence of the claimant’s harassment complaint. Other than that, we are satisfied that any concerns raised by the claimant’s team members related to his confidence and ability to lead, rather than to his ability to fit into the respondent’s “*culture*” or otherwise “*take a joke*”. As a result, and based on what we read and heard, we are unable to conclude that the incident of harassment infected in any way the respondent’s eventual decision to dismiss the claimant.

83. In conclusion, the Tribunal appreciates that the claimant was naturally suspicious because at the time of his dismissal he was given few details as to why the respondent had so quickly lost faith in his ability to integrate into the organisation and within such a short space of time. Significant details were indeed withheld by the respondent at the time and, in our view, the claimant was treated badly and with a lack of consideration.

84. As a result, we find that the claimant was dismissed because during the first few days of his employment Victoria Eades (rightly or wrongly) rapidly lost confidence in her decision to recruit him. The proximity of her decision to the incident of harassment was indeed unfortunate, but we are not persuaded that the incident itself had any bearing on her ultimate decision. The claimant's complaint of direct discrimination therefore fails and should be dismissed.
85. The Tribunal recognises that the claimant will naturally be disappointed by our decision. We do not approve of the way in which the claimant was treated by the respondent, but are simply unable to conclude that such treatment amounted to discrimination. We nevertheless hope that the respondent is prepared to learn valuable lessons from the claimant's case.

Hearing to determine remedy

86. The hearing listed to take place on 22 March 2021 will take place via video, if the parties are otherwise unable to reach a settlement in respect of the harassment complaint. The claimant should be aware that the Tribunal may not only order the respondent to pay him compensation (namely, injury to feelings and interest), but also make appropriate recommendations (to the effect that within a specified period the respondent takes specified steps for the purpose of addressing or reducing the adverse effect of the harassment on the claimant).
87. Furthermore, subject to further submissions and/or evidence from the parties, in considering an award for injury to feelings the Tribunal will among other things take into account the timing of the respondent's concession on liability (that is to say, before any evidence was heard), particularly in view of the fact that it has been aware of the claimant's personal circumstances from the outset of his employment.

Employment Judge Licorish
Date: 30 December 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
Date: 31 December 2020