EMPLOYMENT TRIBUNALS

Claimant: Mr K Czajka

First Respondent: All About Community Limited

Second Respondent: Mr G Bentley

Heard at: London Central (Remote via CVP) **On:** 16 to 18 March 2021

Before: Employment Judge K Welch
Mr S Ferns
Mr P Lewis

Representation
Claimant: Ms M Oghanna, Solicitor volunteer at WLAC
First and Second Respondent: Mr D Irvine, former Director of First Respondent

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant's claims of sexual harassment against the First and/or Second Respondent are not well founded and fail;
2. The Claimant's claim of unlawful deductions from wages and failure to provide pay slips succeeds against the First Respondent;
3. The First Respondent is ordered to pay to the Claimant the net sum of £1,715.55.

RESERVED REASONS

1. This is a claim brought by the Claimant against All About Community Limited (the First Respondent) and Mr Bentley (the Second Respondent).

2. The Claimant was employed by the First Respondent from 24 April 2019 until 31 May 2019, following his resignation on 16 May 2019.

3. The Claimant's claims were for sexual harassment against the First and Second Respondents under section 26(2) Equality Act 2010 ('EqA'). He brought additional complaints of failure to provide pay slips under section 8 Employment Rights Act 1996 ('ERA') and was allowed to amend his claim at a preliminary hearing for case management on 12 February 2020 before EJ Goodman, to add a claim for unlawful deductions from wages under section 13 ERA.

4. The hearing was a remote public hearing conducted using the Cloud Video Platform ("CVP") under Rule 46.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. Some members of the public attended. The parties were told that it was an offence to record the proceedings.

6. From a technical perspective, there were some minor difficulties experienced but the parties were able to complete the evidence and the submissions within the three day listing. The decision was reserved.

7. The Tribunal had been provided with a number of documents electronically which included a hearing bundle and page numbers referred to in this Judgment refer to page numbers within that bundle. We were also provided with witness statements for all witnesses attending the Tribunal hearing. A further witness statement was provided for Mr Mason, a former director of the First Respondent, although the panel attached such weight to it as was appropriate in light of the fact that Mr Mason was unable to attend the Tribunal to give sworn evidence and have his testimony tested by cross examination.

8. We heard from the following witnesses:

    a. The Claimant himself;

    b. The Second Respondent;

    c. Miss Chambers, a manager at the First Respondent;

    d. Mr Newton-Sawyerr, an employee of the First Respondent;

    e. Mr Irvine, a former director of the First Respondent.

9. The Respondents' witness statements failed to deal with many of the allegations contained within the claim form and/or the Claimant's witness statement. The witnesses gave evidence that they believed their statements should state the facts that they knew had happened and did not have to state denials for each of the allegations they did not agree with. Whilst ordinarily we would expect witness statements to deal with each of the issues/ allegations, we considered it plausible that the Respondents did not appreciate how the witness statements should be drafted even when having considered the Orders given by Employment Judge Goodman and Employment Judge Joffe.

10. A preliminary hearing for case management purposes took place on 12 February 2020 before Employment Judge Goodman. At this hearing, the Claimant was given leave to amend his claim to bring a claim for unlawful deductions from wages (referred to above) and the following issues were agreed by both parties:

LIST OF ISSUES

Section 26: Harassment related to sex or sexual orientation

11. Did the Second Respondent engage in unwanted conduct as follows:

a. Questioning the Claimant about his relationship status;

b. Complimenting the Claimant on his physical attributes;

c. Touching the Claimant's lower back, backside and stomach from the second week of employment;

d. Persistently asking the Claimant to go on a trip with him, to share a room and use a gay men's dating app;

e. On at least three occasions showing the Claimant photographs of his penis;

f. Asking about preferred sexual positions and expressing his own preference;

g. Suggesting they use the swing at the workplace for sexual intercourse; and

h. Trying to kiss the Claimant.

12. Was the conduct of a sexual nature?

13. If not, was the conduct related to the Claimant's protected characteristic?

14. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

15. If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

16. In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Unlawful deductions from Wages

17. For each week of employment, what amount was properly payable for the Claimant's work?

18. For each week of employment, what was required by statute to be deducted from his wages for tax and national insurance? Employment Rights Act section 14(3).

19. For each week of employment, what had the Claimant authorised (by notice in writing and by not opting out) to be deducted as pension contributions Employment Rights Act section 14(4)?

20. Have the amounts required to be deducted by statute in fact been paid to HMRC, at any time, on the Claimant's behalf?

21. Have any amounts deducted as pension contributions in fact been paid to the pension fund on the Claimant's behalf?

22. The unlawful deductions claim, having been made more than three months after the last deduction, the Tribunal must consider whether it was not reasonably practicable to present it in time, and if it was not, whether it was presented within a reasonable time thereafter.

Itemised Pay Statements - Employment Rights Act 1996 section 8

23. In any week of employment, did the First Respondent, as employer, fail to provide the Claimant, at or before the time of payment, with a written itemised statement of payment?

24. If the Tribunal finds it did not, it will make a declaration to that effect, and may also award an amount equal to un-notified deductions made from pay, for up to 13 weeks.

Remedies

25. If the Claimant succeeds, in whole or part, in the harassment claim the Tribunal will be concerned with issues of remedy.

26. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

The Unlawful Deductions from Wages/ Failure to provide payslips claim

27. On the last day of the hearing, the First Respondent, in its submissions, accepted that it had made unlawful deductions from the Claimant's pay and had failed to provide pay slips in a timely manner. It therefore accepted that it owed the Claimant the sum claimed in the updated schedule of loss, namely £1,715.55. Therefore, judgment was made in this amount with the consent of the First Respondent.

Findings of fact

28. The Claimant carried out a trial shift before commencing his employment with the First Respondent on 24 February 2019 as a member of the bar staff team in the First Respondent's bar.

29. The First Respondent is an LGBTQ+ bar and sexual fetish club, with a hotel attached to it. The events held in the downstairs bar included individuals engaging in sexual activities whilst the bar staff provided them with drinks. The Respondents' witnesses gave evidence, which we accept, that the environment in the bar is such that customers and staff regularly speak about their sexual preferences, which can include saying who the individuals 'fancy'.

30. The Claimant was given an employment contract [p53-57]. He was employed on a zero hours basis, but it was clear that he worked what appeared to be full time hours

throughout his employment. The Contract provided [p56]:

"*Disciplinary and grievance procedures*

We have grievance and disciplinary procedures. They are available in the folder in the main bar and are the ACAS Guidelines. If you are unable to find it or you would like further clarification, please ask the manager on duty for a copy or speak to one of the other managers."

31. The First Respondent relied upon the ACAS policies, namely their 'If you are treated unfairly at work' policy [p129-133] and their grievance policy [p134-142]. Unfortunately, the First Respondent appeared to have misread some of the policies, which meant that it believed that no investigation could be undertaken unless an employee had made a formal complaint.

32. The First Respondent kept a yellow folder, which was located on the upstairs bar. All of the First Respondent's employees appeared to be aware of the existence of this folder and knew what it contained. This folder included copies of the ACAS policies referred to above, together with various documents including holiday forms, shift forms and housekeeping, and the Heineken guide (dealing with how to pour drinks/ clean pipes etc).

33. The First Respondent's witnesses and the Second Respondent gave evidence that, as part of the induction process, new recruits were shown the yellow folder and the policies and asked to read them. The new recruits then had to sign to say that they had read them. However there was no documentary evidence supporting this, and we saw no evidence that the Claimant had been so inducted. We are satisfied, however, that the employees should have been aware of the ACAS policies.

34. There was no evidence of any formal training for employees concerning equal opportunities/ harassment. The panel considers that, particularly in the environment in

which the employees work, it is more important to ensure that guidance and training is given to all employees on harassment.

35. The Claimant had, prior to his employment with the First Respondent, arrived in England from Poland to work in the UK. For the majority of his employment, he was aged 21 years. Whilst working in the bar, it was clear that the Claimant was a popular member of staff who was well liked by the pub's customers and its staff. The Second Respondent gave evidence that the Claimant often went around the pub purring, hissing or meowing like a cat, depending upon his mood. It was clear to the panel that it was a friendly working environment, and that the Claimant had appeared to be happy during his time there. This was supported by WhatsApp messages where the Claimant had started messages saying, "Meow…" [p60] and regularly used emojis of cats [p62, 70, 72 and 73]. There was also oral evidence given that on occasion he had sniffed customers' ears.

36. The First Respondent had two general managers working in the bars at the time; the Second Respondent and Ms Chambers. There was quite a large number of employees working in the bars, although some of these only carried out one shift a week.

37. The upstairs bar has a front and back counter [p101] with a relatively narrow passageway towards the back. The whole bar and surrounding area was covered by CCTV and, from the pictures provided, it was relatively clear that should any incidents occur around the upstairs bar, they would likely be caught by CCTV. There was limited CCTV coverage downstairs other than the bar and its immediate vicinity, which was understandably due to the types of events, which were regularly held there.

38. We accepted the Respondents' witnesses' evidence that due to the type of venue that the First Respondent is, CCTV footage must be retained for between 2-3 weeks after the date of the recording, as there is a legal requirement to do so.

39. Miss Chambers was responsible for sending all time sheets to the owners for them to undertake payroll functions. Ms Chambers was also responsible for sorting out the rotas for the staff working in the bars.

40. At first, the relationship between the Second Respondent and the Claimant was friendly, which the Claimant appeared to accept. There was evidence from Mr Newton-Sawyerr, which we accepted, that the Claimant would often have a drink with the Second Respondent after work. Further, it was clear from the oral evidence and supported by the WhatsApp messages [p60-79] that the Second Respondent and the Claimant were in regular contact with each other.

41. The WhatsApp messages within the bundle between various parties appeared to us to be incomplete, since there were parts of messages which were responded to, where the original message was not within the screenshots of messages that we were provided. Also, the Second Respondent queried in evidence where, for example, pictures were within the messages, which may have given more context to the messages themselves. Therefore, whilst it was the case that the WhatsApp messages provided as part of the bundle significantly reduced in frequency towards the end of the Claimant's employment [p79], we do not necessarily accept the Claimant's assertion that this reduction in messaging corroborated his allegations that he was being harassed.

42. We accept that at some stage early in the Claimant's employment, the Second Respondent asked the Claimant if he had a boyfriend. Whilst the Second Respondent denies this, we find that it would have been a natural thing to have been said, and accept the Claimant's evidence that he was asked. We also, however, find it plausible that the Second Respondent may not have recalled doing so.

43. We also accept that the Second Respondent complimented the Claimant over his appearance and voice. The Second Respondent accepted this and gave evidence

that this related to discussions between him and the Claimant concerning the Claimant's acting ambitions, where the Second Respondent was providing reassurance to the Claimant about his appearance both in conversation and via WhatsApp messages. For example, "*Omg. U look cool mate with or without the hair u look good. Ya eyes steal it.*" [P62].

44. The Claimant said that on one occasion, in mid-April 2019, the Second Respondent had complimented him and then said, "*is this sexual harassment? You can report me in the book*!" and referred to a red book kept in the office. None of the Respondent's witnesses knew of a red book and the Second Respondent denied saying this. We do not accept that this took place.

45. When the Claimant joined the First Respondent, the Second Respondent had already suffered a breakdown of his marriage. The Claimant provided support to the Second Respondent, which was appreciated, as evidenced by the WhatsApp messages [p 60/62].

46. The Claimant gave evidence that the Second Respondent had touched his stomach from the second week of his employment, whilst saying that he could tell the Clamant used the gym. The Second Respondent denied this. We accept that this may have taken place.

47. The Claimant also alleged that the Second Respondent had brushed against him. There was a difference in evidence between the Claimant and the Second Respondent, as the Claimant alleged that the Second Respondent purposefully did not move from the narrow part of the upstairs bar, in order that the Claimant had to brush past him. This was denied by the Second Respondent. We accept that, due to the narrow space in the upstairs bar, it is highly likely that the Claimant was touched by the Second Respondent when squeezing past through the narrow opening. However, we do not accept that the Second Respondent purposefully manoeuvred this.

48. There is a further difference in evidence regarding the Second Respondent's trip to Thailand, Taiwan or India. The list of issues suggested that the Claimant alleged that he was "persistently" asked to go on the trip by the Second Respondent. However, the Claimant's own evidence was that he was not persistently asked. The Second Respondent's evidence was that he would not have asked the Claimant to go on holiday with him as he could not subsidise anyone as he did not have the money to do so. We think it possible that the Second Respondent could have mentioned the possibility that the Claimant join him on holiday, in conversation, as we can imagine how this may have come up. However, we do not accept that the Second Respondent suggested they use the homosexual dating app, Grindr, "*to have some fun*" as the Claimant alleges.

49. It was accepted by all parties, that following the Second Respondent's holiday, he was showing his holiday snaps to the Claimant on his mobile phone. As the Claimant was flicking through the photographs, a photograph of a penis came onto the screen. The Claimant's evidence was that he believed this to be the Second Respondent's penis, but the Second Respondent stated in his evidence that this was a picture from Grindr, which flashed up on his phone. We accept the Second Respondent's evidence that this was not a picture of his penis. Regardless of where the picture was from, the evidence of what happened following the picture being shown was consistent from both the Claimant and the Second Respondent. Namely, that the Second Respondent immediately took back his mobile phone and deleted the picture, particularly as he would share the photographs with his family. The Second Respondent gave evidence that he was embarrassed and awkward by it being shown. It was therefore clear to us, and the Claimant appeared to accept at the time, that this was not a deliberate act on the part of the Second Respondent and was a mistake.

50. The Claimant's witness statement (paragraph 21) stated that he was shown another picture of a penis at the beginning of April and on a further unknown occasion, although

on the latter occasion, no context was provided. The Second Respondent denied that any further pictures of penises were shared. We accept that no other photographs of penises were shown to the Claimant.

51. At some point during the Claimant's employment with the First Respondent, it was accepted by all parties that the Second Respondent plaited part of the Claimant's hair. The Claimant's hair was quite long at the time and the Second Respondent gave evidence that this was an attempt to show the Claimant how his hair could be styled for hygiene purposes. The Claimant gave evidence that he asked the Second Respondent to stop touching his hair, but the Second Respondent denied this and said that the Claimant was so pleased with the part of the hair he had plaited that he ran around meowing like a cat because he was so happy with it and asked him to carry on. We accept the Second Respondent's evidence and consider that the Claimant gave consent for the plaiting of his hair and that the Claimant did not ask the Second Respondent to stop.

52. The Claimant gave evidence that he was asked by the Claimant whether he was a '*top or bottom*' referring to the positions for gay men during sexual intercourse. The Claimant stated that the Second Respondent had said that he was a "*power bottom*". The Second Respondent expressly denied this conversation took place. The bundle contained messages between the Claimant and Mr Newton-Sawyerr which said that the Second Respondent was, "…*very self obsessed. Always talking about himself and his sexual desires*…". In giving evidence, Mr Newton-Sawyerr confirmed that he had been "*sounding off*" about the Claimant at the time. He was not happy that one of his colleagues had been sacked and he had been led to believe that the Second Respondent was responsible for this and, in his words, had been '*poisoned against him*'. He accepted that he had sent the WhatsApp messages but that he was surprised that he had done so when he re-read them. He gave evidence that sex is regularly discussed in the bar and that the only reason he could think for writing that message

was that sometimes the Second Claimant referred to people in the bar that he fancied. However, Mr Newton-Sawyerr made clear that this was only about customers and not staff. We do not believe that there was an express conversation between the Claimant and the Second Respondent concerning the topic of his sexual positions, although we accept that the Claimant may have overheard something the Second Respondent said.

53. The Claimant alleges that, following an event in the downstairs bar, one of the items of apparatus (a swing) had not been taken down. His evidence differed from the Second Respondent saying, "*Oh Chris, it's still up*" in the discussion he had with Ms Chambers on 16 May 2019 [page 80] to, "*there is a swing over there they have left out - maybe we should use it?*" [Claimant's witness statement paragraph 24]. The Claimant accepted, whilst giving evidence, that the Second Respondent had not specifically said, "*maybe we should use it*" but had gestured with his facial expressions/ a look rather than a comment. We do not accept that the Second Respondent suggested either expressly or by gestures that the Claimant and he should use the swing.

54. The Claimant gave evidence that the last straw was when the Second Respondent tried to kiss him on 11 May 2019. The Claimant's evidence was that he was on a break when a drag artist, who was well known to the Claimant, came into the bar and kissed the Claimant on the cheek. The Claimant says that the Second Respondent was in the bar with his dog at the time, and after the drag artist had left, approached the Claimant to say, "*you never kiss me like that*" and attempted to kiss him. There were slight differences between what was said in the Claimant's witness statement and what was said whilst giving evidence, including, that he was eating. The Second Respondent denies this entirely.

55. The Claimant stated that he made notes of the incident but that he had destroyed them when he made his witness statement. We find that hard to understand. We also were

concerned that this event, said to be the last straw and most recent, was not mentioned to Ms Chambers when he discussed the reasons for his resignation on 16 May 2019. Finally, this incident was alleged to have taken place only 5 days before his resignation, and had he provided specific details of this to Ms Chambers, this could have been checked on the CCTV footage, as it would have been retained at that time. For these reasons, we do not accept that this took place.

The Claimant's resignations

56. The Claimant initially resigned from his employment on 9 April 2019. He sent a WhatsApp message to Ms Chambers saying that he was leaving and would leave as soon as possible [p106]. This resignation did not form part of the Claimant's witness statement or chronology, but the Claimant confirmed in evidence that he had resigned and then withdrawn it. The reason he wished to leave on the first occasion was that he felt that the First Respondent had lied to him about deducting taxes from his pay. The Second Respondent sent a WhatsApp message to the Claimant on the same day as his first resignation, 9 April, saying "*Mate why leaving? Your[e] doing well here and we are giving u full time*" [p61].

57. It was clear that the Claimant felt able to complain about his taxes/ payslips. This could have provided an opportunity for the Claimant to complain about the other treatment he alleged to have suffered at the hands of the Second Respondent. The Claimant's evidence was that he queried whether he was being sensitive and whether it was him, misunderstanding what was going on rather than the Second Respondent committing acts of sexual harassment. The Claimant said that at the end of April, following the alleged incident with the swing, he "*connected the dots*".

58. The Claimant continued to work for the First Respondent. His second resignation was on 16 May 2019. On this occasion, he informed Ms Chambers that he wished to leave. The Claimant covertly recorded the conversation and a transcript of this was provided

at p80-81. The Claimant had not recorded any other conversations/ exchanges, either with the Second Respondent, or otherwise. The reason he gave for recording the conversation with Ms Chambers was "*sincere*" as he did not think she had been truthful regarding an earlier conversation she had had with Emira, a colleague at the First Respondent's bar.

59. The Claimant's second resignation was the first time that he mentioned any allegations against the Second Respondent. He specifically asked that Ms Chambers keep his complaints confidential and asked that she did not tell "*anyone, or the manager*".

60. Whilst the claim form alleged at paragraphs 15 [p19/20] that the Claimant told the Second Duty Manager (which he confirmed was Ms Chambers) of the harassment and unwanted conduct, in his statement and in evidence, he confirmed that this paragraph and paragraphs numbered 16 and 18 of his claim form were factually incorrect.

61. The Claimant gave evidence that he did not raise his concerns about the Second Respondent's treatment of him prior to his resignation, as he did not consider that the First Respondent would take his complaints seriously. He also said that the owners of the business (Messrs Irvine and Mason) were close to the Second Respondent, thought he was a good manager and had helped him out on a number of occasions. He therefore did not feel that a fair investigation would be carried out.

62. The Claimant went to Poland for an agreed break immediately after his resignation. He gave evidence that he did not want to be at the respondent's pub, Central Station, when Ms Chambers informed everyone that he was leaving. The Claimant therefore returned to work for the First Respondent on the 22 May 2019 to work his week's notice. Ms Chambers arranged the shifts so that the Claimant was not working with the Second Respondent during the last week of his employment.

63. The Claimant worked his final week without any issues arising. During his final week, the Claimant swapped his allocated shift with one of his colleagues. This meant that he was working alongside the Second Respondent. The Claimant's evidence was that he would be able to work in the downstairs bar and did not believe that the Second Respondent would go there whilst he was working his shift. However, the evidence from Mr Newton-Sawyerr was that working in the downstairs bar, it would be more likely that the manager would need to come down to refill stock etc, where there was less CCTV coverage, and that, therefore, it did not make sense for the Claimant to change his shift if he really was trying to avoid working with the Second Respondent. We accept the evidence of Mr Newton-Sawyerr that the Claimant was more likely to come into contact with the Second Respondent having changed his shift, particularly as they would be together at opening time, which was when the pub was quiet.

64. Ms Chambers felt that she could not keep the Claimant's complaints to herself. She therefore spoke to her manager, Mr Glazebrook, and they both spoke to the Second Respondent about the complaints the Claimant had made. The Second Respondent denied any instances of inappropriate behaviour.

65. The Claimant gave evidence that he did not believe that the First Respondent had taken the complaints he made to Ms Chambers seriously. He did acknowledge that he had asked her not to do anything about his complaints. He gave evidence that he had spoken with Mr Glazebrook after his return and had been asked to stay.

66. Ms Chambers then spoke to Mr Irvine explaining what the Claimant had said to her. She explained that the Claimant did not wish to make a formal complaint and Mr Irvine said that they could not take it further without him doing so. We accept that the Claimant provided insufficient detail and no dates of the alleged incidents to enable the First Respondent to properly investigate the matters raised.

67. The Claimant then contacted Ms Chambers on 28 May 2019 asking who he should address his grievance to. Ms Chambers responded to say that she had spoken to Mr Irvine and that a grievance letter would only take place after a complaint had been officially made and where he was unsatisfied with the outcome. The Claimant responded to say that his grievance was not related to the Second Respondent [p90] it was to do with his payslips and that he, "[*didn't] care about guy*" [p91]. No grievance was lodged by the Claimant in respect of his alleged treatment by the Second Respondent.

68. The Claimant's employment ended on 31 May 2019.

Submissions

69. All parties provided written closing submissions and were given the opportunity to address the panel further, which the Claimant's representative did. This judgment will therefore not go into detail on the submissions, and will only refer to submissions relating to the claims relating to sexual harassment, since the First Respondent conceded in its submissions that the Claimant was entitled to reimbursement of the unlawful deductions from pay.

70. The First and Second Respondents' submissions in brief were that the Second Respondent had not committed acts of sexual harassment against the Claimant, and that the First Respondent was not liable. The Claimant failed to raise the instances of sexual harassment whilst the CCTV footage could have been checked. The Claimant had changed the statement in the claim form when doing his witness statement and therefore there were issues of credibility due to the Claimant changing his evidence. The Respondents also contended that WhatsApp messages had been deleted/ manipulated.

71. The Claimant's submissions on his sexual harassment claim under section 26(2) EqA, were supported by an authorities bundle, which included 11 cases and relevant sections of legislation together with the EHRC Guidance Note on sexual harassment. In brief, the Claimant contended that the victim need not have made the perpetrator aware that the conduct was unwanted and that some conduct must be presumed unwanted unless proven otherwise. The conduct complained of was both unwanted and had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

72. The First Respondent had put forward no evidence supporting a defence under section 109(4) EqA.

73. As far as remedy was concerned, the Claimant should be awarded compensation in the top Vento guideline band due to the conduct extending over a period of time and the effect it had on the Claimant.

Law

74. Section 136 of the EqA governs the burden of proof and discrimination claims which provides:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person A contravenes the provision concerned, the court must hold that the contravention occurred.

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision."

75. In Ijun -v - Wong [2005] IRLR 258 and Madarassy - v- Nomura [2007] IRLR 246, the Court of Appeal identified a two stage approach to the burden of proof. Whilst both were decided under earlier discrimination legislation, they are still relevant. The Tribunal would first consider whether, in the absence of an explanation from the Respondent, the facts were such that it could properly conclude that discrimination had

occurred. The Court of Appeal emphasised in Madarassy that this could be a conclusion that the Tribunal could properly reach: there would have to be something (although that might not in itself be very significant) beyond the difference in protected characteristic and a difference in treatment for this to be the case. If the facts were of that nature, the burden would be on the Respondent to prove it had not discriminated against the Claimant.

76. Section 136 of the EqA has not removed the power of the Tribunal, in an appropriate case, to draw a common law inference of discrimination. Where, however, a Claimant does rely on Section 136, there need to be sufficient facts, such that the Tribunal could make a finding of discrimination absent an exonerating explanation given by the Respondent.

77. Where the Claimant fails to prove, on the balance of probabilities, that a particular alleged incident did happen, then complaints based on that alleged incident fail.

78. Section 136 does not require the Respondent to prove that alleged incidents did not happen.

79. Harassment - Section 26 of EA 2010 states (in part)

    (2) A also harasses B if—

    (a) A engages in unwanted conduct of a sexual nature, and

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

    (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

    (a) the perception of B;

    (b) the other circumstances of the case;

    (c) whether it is reasonable for the conduct to have that effect.

80. Unlike direct discrimination, harassment does not require a comparative approach; it is not necessary for the worker to show that another person was, or would have been, treated more favourably.

81. In most cases, whether or not the conduct in question can be categorised as “of a sexual nature” will be self-evident. This is something which should be decided on a common-sense basis by reference to the facts of each particular case.
82. A single incident can be sufficiently serious to amount to sexual harassment.
83. Where conduct is inherently unwanted, such as sexual touching, the claimant does not have to make a complaint (Insitu Cleaning v Heads 1995 IRLR 4).
84. The EHRC’s Employment Code provides that conduct ‘of a sexual nature’ can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature. However, not all physical contact between two individuals amounts to sexual harassment (even where that contact is unwanted). Whether it amounts to conduct of a sexual nature so will depend on a number of factors. These include:
    a. the nature of the physical contact and the part of the anatomy that is touched;
    b. the circumstances or the context in which the contact takes place;
    c. the relationship between the two individuals;
    d. whether (the conduct is unwanted and) the recipient has made clear that it is unwanted;
    e. the intentions of the person making the contact;
    f. the perception of the recipient of the conduct;
    g. how a reasonable person would view or perceive the conduct
85. The fact that the alleged harasser did not regard it as sexual harassment does not mean that it cannot be harassment contrary to section 26(2).
86. The Tribunal’s approach must not be to “carve up” the complaints one by one and measure detriment in relation to each; it must look at the bigger picture and consider the complaints in their totality or as an accumulation. A carving-up exercise gives rise to the potential for ignoring the totality.

87. Also, the act of harassment complained of may be so obviously detrimental that the lack of any contemporaneous complaint is of little or no significance.

88. There may be cases where the complaint arises from a succession of events, which on their own would not signify much, contemporaneous indicia of sensitivity and the alleged perpetrator's perception become material. Conduct which is not expressly invited can come within the meaning of "unwanted". The claimant does not have to make it clear in advance that it is unwanted. Neither is it necessary for the claimant to have made a 'public fuss' after the event. In Reed at paragraph 30 the EAT said:

    "*Tribunals will be sensitive to the problems that victims may face in dealing with a man, perhaps in a senior position to herself, who will be likely to deny that he was doing anything untoward… Provided that any reasonable person would understand her to be rejecting the conduct of which she was complaining, continuation of the conduct would, generally, be regarded as harassment*"

89. Section 109(4) of the EqA provides a statutory defence for an employer in the following circumstances:

    "Section 109 - Liability of Employers and Principles

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

    (a) from doing that thing, or

    (b) from doing anything of that description."

Conclusions

90. We have, in our findings of fact, made specific findings on each of the alleged incidents of sexual harassment relied upon by the Claimant [see paragraphs 36 to 55 above].

91. We did not consider that there were sufficient facts from which we could decide, in the absence of any other explanation, that the Second Respondent had contravened section 26 EqA so as to reverse the burden of proof under section 136 EqA.

92. We went on to consider the totality of the incidents we found proved in considering whether sexual harassment had taken place. We also considered whether what appeared to be innocuous incidents might, when taken as a whole, constitute sexual harassment.

93. We did not consider that the incidents we found to have happened constituted unwanted conduct. We took into account the fact that the incidents took place in a LBGT+ bar, where sexual intercourse takes place in front of the employees. This does not prevent the possibility of sexual harassment taking place, but we accept that discussions about partners, sexual positions and preferences may be discussed more than in other workplaces.

94. We found that the Second Respondent had complimented the Claimant, but we do not consider that this was conduct of a sexual nature when considering the context in which those discussions arose. We accepted the Second Respondent's explanation that his comments were responding to the Claimant's concerns over his appearance relating to his ambition to undertake an acting career.

95. We did not find that the Second Respondent had asked the Claimant about his relationship status and/or had touched him on his lower back or backside. We found that the Second Respondent may well have brushed against the Claimant (or vice versa) when going through the narrow opening in the upstairs bar, and may have touched his stomach, however we did not consider these to be conduct of a sexual nature.

96. We accept that showing the Claimant a photograph of a penis is conduct of a sexual nature. However, when considering the context in which this was shown, i.e. where the Claimant was browsing the Second Respondent's holiday photographs, we do not accept that this had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

We accept that showing photographs of a penis may have the effect of creating such an environment, however, when considering the circumstances of the incident together with both parties evidence that the Second Respondent was embarrassed and apologetic and immediately deleted the picture, we do not consider it reasonable to have had that effect. We do not accept that there were further incidents where the Second Respondent showed pictures of penises. In our view, the awkwardness of the first occasion, which was evident from the evidence of both the Claimant and the Second Respondent, makes a deliberate repeat most unlikely.

97. In light of our findings of fact, we therefore conclude that the incidents, whether viewed individually or as a series of events, did not cross the threshold to constitute sexual harassment.

98. It is therefore unnecessary for us to consider whether the First Respondent was in a position to rely upon the defence under section 109(4) EqA. However, we consider it appropriate to state that the First Respondent provided no evidence to support its assertion that it took all reasonable steps to prevent the Second Respondent from committing acts of discrimination. We consider that the training provided was inadequate and the application of the ACAS guides was insufficient to support this line of defence. Therefore, had we found the Second Respondent guilty of discrimination, we would have had no hesitation in holding the First Respondent jointly and severally liable for this.

99. In conclusion, we do not find that the Second Respondent sexually harassed the Claimant and therefore the Claimant's complaints under section 26 EqA are dismissed against the First and the Second Respondents.

100. The First Respondent is ordered to pay the Claimant the sum of £1,715.55 for the unlawful deductions from the Claimant's pay.

Employment Judge Welch

Date 31 March 2021

JUDGMENT SENT TO THE PARTIES ON

31/03/2021.

FOR THE TRIBUNAL OFFICE