

Case: 1804896/2020 (V)



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Bielby  
**Respondent:** Excil Electronics Ltd. t/a LPA Lighting Systems

## AT A HEARING

**Heard at:** Leeds by CVP video conference      **On:** 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> March 2021  
and 13<sup>th</sup> April 2021

**Before:** Employment Judge Lancaster  
**Members:** Mrs JL Hiser  
Mr M Elwen

### Representation

**Claimant:** Mr L Fakunle, solicitor  
**Respondent:** Miss L Hatch, counsel

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was CVP video conference. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing

## JUDGMENT

The claims are dismissed

## CASE MANAGEMENT ORDER

### Employment Tribunals Rules of Procedure 2013 rule 61 (2)

Mr Fakunle requests that it be recorded that he objected to the Employment Judge restricting his cross examination of the witness Mr H Lunn. The questions being asked could only possibly go to credit and there was not, in fact, any dispute with the actual substance of the written witness statement. That objection was overruled on the grounds that the curtailing of unnecessary cross-examination was proportionate to the importance of the issues, and avoided delay.

## WRITTEN REASONS

1. Written Reasons having been requested by the claimant at the Hearing, these are now provided based upon the transcript of the unanimous decision given orally immediately upon the conclusion of the Tribunal's deliberations.
2. The claimant was employed by the respondent from 23<sup>rd</sup> February 2013 until her summary dismissal on 20<sup>th</sup> May 2002. In 2016 her job description changed to Team Leader and in 2019 was given additional responsibilities so as to cover two teams, or cells, rather than one. Both those promotions were confirmed by Mr N Orme who was the manager above her immediate line manager.
3. The issues in this case were identified at a preliminary hearing before Employment Judge Little on 3<sup>rd</sup> November 2020. A copy of the material parts of the order made on that occasion are now reproduced as an endnote to this judgment.

### Sexual orientation discrimination

4. We can most conveniently deal firstly with the allegation of discrimination. This is the matter which arose in the additional point brought up by Mr Fakunle as we were about to deliver judgment and which we therefore adjourned to consider further. We agree with Miss Hatch's submission, notwithstanding Mr Fakunle's protests to the contrary, that he did not specifically challenge Mr Orme in cross-examination as to what he had allegedly said in 2016 was the reason why he was allegedly unhappy with the claimant taking a day of work. It is not, however, material to our decision: we have nonetheless taken into account the parties' respective memories, or lack of any memory, of this event.
5. The claimant is a gay woman, she alleges that the manager who dismissed her, Mr Orme, exhibited a hatred towards her because of her sexual orientation. It is claimed that that was the reason why he dismissed her and also why it is alleged that it was he who was instrumental in delaying payment for the two weeks that she was self-isolating before termination.
6. There is no factual evidence before the Tribunal from which we could possibly infer (section 136 Equality Act 2010) that the delayed payment has anything to do with the claimant's sexual orientation. She was required to self-isolate having spent time with her estranged partner who was exhibiting symptoms that may well have been evidence of having contracted Coronavirus. At the same time the claimant's current housemate was therefore also required to self-isolate for the same precautionary reasons. The respondent operated a scheme at this time where they were prepared to pay employees who were self-isolating and the claimant's housemate therefore made a claim and was duly paid. The claimant was not paid at the same time but we are quite satisfied that the reason was that the request, which did not initially go through Mr Orme but another manager Mr Lumb, was delayed is simply because it was not registered in time before the next pay day. When it was registered and after that new payroll date had passed the claimant did receive payment. So there is nothing whatsoever to suggest that that difference in the timing of the payment to her and her housemate was because of her sexuality.
7. In relation to the dismissal, there is no evidence of actual differential treatment with anybody who did not share the claimant's protected characteristic. She relies on four comparators but they are not properly people who are in the same or in not materially

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different circumstances as required under the definition in section 23 of the Equality Act.

8. In brief, though we shall come to this in more detail when discussing the unfair dismissal complaints, the claimant was alleged to have committed two acts of misconduct; that is failing to comply specifically with the respondent's oral instructions as to how employees were to conduct themselves if exposed to a risk of contracting the Coronavirus in the early days of the pandemic in the spring of last year.
9. On the first occasion on 26 March the claimant had come into work, having had symptoms of coughing during the night before, and was then audibly and noisily coughing whilst at work and was sent home.
10. Then subsequently on 17 April she attended to visit the home of her estranged partner, for whom she was caring, because that lady was self-isolating because she was at risk, and also to care for their dogs that were in the custody of her wife. Over the course of that weekend her partner exhibited severe signs of illness that were strongly consistent with her having contracted Coronavirus, even if she may not in fact -absent any medical evidence one way or the other - have done so, and yet the claimant nonetheless attended at work on 20 April and again was sent home to self-isolate.
11. The alleged comparator the claimant seeks to rely upon is firstly Mandy Clayton. The claimant's suggestion that Ms Clayton went into work and was seen in the canteen is purely hearsay. We accept reservedly the evidence of Mr Orme that she did not go into work but in fact met him at the gates on the morning of 20 March and expressed concerns that she may have had relevant symptoms and therefore she too was sent home. So the difference between her situation and the claimant's is that she had never actually gone into work but had taken steps to contact the manager and take advice.
12. There is also an allegation that David Moody on 24 March was sent home whilst displaying symptoms of a cold at work. That is correct. The difference there is that cold like symptoms were not at that time and still not have been specifically identified as potential indicators of having contracted the virus, whereas coughing is a potential indicator. But in any event Mr Moody was treated therefore no differently to the claimant on the first incident when she was coughing at work. There were potential concerns about their health and as a precautionary measure both were sent home. Patrick McMahon who was also originally identified as a potential comparator was also sent home in exactly the same circumstances as Mr Moody.
13. On 4 May a junior employee Maria Kovacs had attended work when it became apparent from her social media profile that she had, in breach of the then guidance and regulations, attended a family party. She was given a final written warning. The difference there is that she had not, although breaching the regulations, been in the company of anybody who was actually identified as being potentially a carrier of the virus whereas the claimant in attending at her estranged partner's home had. Also there is a material difference in seniority and in age. The claimant is a senior employee, a team leader. Mandy Kovacs is a junior employee who admitted that she behaved inappropriately and was issued a warning accordingly.
14. The fourth alleged comparator is Jordan who on 9 April was sent home having been coughing at work. He had, however, experienced no symptoms before attending at the workplace but whilst there was then being exposed to dust, which may have been the cause. Again he too was sent home as a precautionary measure and treated no differently to the claimant when she was coughing at work on 26 April. Once more the

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material difference is that he had not gone into work having experienced any potential virus symptoms before attending.

15. None of those four people went into work on a second occasion having already been sent home to self-isolate earlier, and therefore having been appraised of the seriousness with which the employer respondent treated its duties to protect its staff during the pandemic.
16. So none of those identified people are in fact relevant material comparators for the purposes of the discrimination complaint. Nor is there any evidence that any hypothetical person in the same situation as the claimant, but who was not gay, would have been treated any differently.
17. But more particularly there are no facts put before Tribunal from which we could absent an explanation conclude that the reason for any less favourable treatment, had there been such, was because of the claimant's sexuality. All she relies upon is a single incident in August of 2016 where she attended a hospital appointment with her wife. She alleges that Mr Orme did not show what she considers would be an appropriate level of compassion for the health of her partner.
18. Mr Orme had no recollection of that incident nor did Mr Hesketh who was alleged to have dealt with it. The issue, such as it was in the mind of the claimant, appears to be that there was a question of whether having taken leave at short notice she was entitled to be paid or not, and this was resolved. The claimant's own case now, although still somewhat vague and not addressed in her witness statement, is that she understood Mr Orme to be annoyed or angry at her taking leave without notice because of the disruptive effect on a busy factory at the month's end.
19. The claimant says that she accused Mr Orme directly of being homophobic on that occasion but that is not an allegation that she has ever expressly repeated since, and in any event this is not of course a complaint of victimisation. Although Mr Fakunle in his submissions refers to the doing of a protected act, that is not what this claim is about, although the claimant's own evidence is primarily that she believes that because she had made what she says was an overt accusation of homophobia in August 2016 Mr Orme was nursing a grudge for the next four years looking for an opportunity to treat her unfavourably.
20. There is no evidence of a relevant material comparator and there are no facts arising from that single alleged historic accusation of homophobia, with no substantive basis other than a perceived lack of compassion for her female partner when she was ill, from which we could conclude that any events during the time of the pandemic in 2020 had anything to do with the claimant's sexual orientation.

### **Unfair dismissal**

21. The principal part of the claim therefore remaining is that complaint of unfair dismissal. It is quite clear to us that the respondents have established that the principal reason for dismissal was indeed misconduct (sections 98 (1) and (2) Employment Rights Act 1996). There can be no doubt that the claimant did not, in fact, follow the respondent's instructions; that is related to conduct. The real issue is whether or not the claimant's explanation for not doing so meant that it was not reasonable to treat that as sufficient reason to dismiss (section 98 (4)).
22. In the very early stages of the pandemic on 6 March the respondents posted a notice giving advice to employees that they should follow the then government regulations and if exhibiting symptoms or potentially exposed to follow what was then the practice

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of seeking to contact NHS 111 and then , if so advised, to self-isolate. But that written advice, although it apparently remained published on the notice boards throughout, was soon superseded by the events of the actual lockdown commencing on 23 March. At that point the respondent because it was an essential employer was entitled to continue working and employees continued to attend.

23. We accept, casting our minds back as we must, that there was a degree of uncertainty at that stage as to how to interpret the government advice as it came out regularly and sometimes without great clarity. However, the respondent was from the start we accept seeking to adopt safe practices to ensure the safety of the workforce so that they could therefore continue to provide an essential service in the work that they were doing.
24. There is no actual dispute in this case that the advice that was passed on was principally done orally and that this was at regular meetings and was updated as appropriate. That advice, we are quite satisfied on the respondent's evidence, was that any employee showing potential symptoms or potentially having been exposed to somebody who may be carrying the virus should not attend at work, they should notify their manager and take appropriate steps until the situation could be clarified.
25. In the course of email correspondence before the disciplinary hearing Mr Orme communicated to the claimant, at page 81 in our bundle, the general extent of that oral advice at the material time. That was that if exposed to symptoms yourself you should self-isolate for seven days or if potentially exposed to symptoms with somebody else 14 days until you are clear that you have not contracted Coronavirus. That evidence has not been challenged.
26. Those, therefore, were the instructions that were operative. Very shortly into that first lockdown period the claimant in the small hours of the morning was coughing for some time. She nonetheless attended at work but whilst at work it caused consternation in her workforce when they heard her coughing. This was very loud because it could be heard across the respondent's premises and we accept particularly Mr Orme's evidence that he could hear this from his office. This was wholly unusual. The claimant does not allege that she had, for whatever, reason, suffered such a bout of coughing at work ever before. Whether the claimant had asthma, and there is no reason to doubt her evidence that she did have some form of asthma, and whether that was potentially therefore the cause of the coughing on that occasion or whether it was hay fever as she allegedly said later to Mr Orme seems to matter little. Nor, of course, can the possibility be conclusively ruled out – in the absence of any test - that it was indeed a symptom of the virus, albeit certainly not one that developed into more persistent illness over the period of isolation. It was an extraordinary event. It was not something she had exhibited at work before and therefore as we have said it did cause a degree of consternation which the respondent, legitimately to us it seems, describes as approaching hysteria on the part of the workforce. These were very difficult times. Everybody was uncertain and everybody would have been worried. And of course we bear in mind that those who continued to work at this time of general lockdown as essential workers were exposed to particular risks. There were very often those at the lower pay scales, those who ordinarily may have to rely on public transport and therefore there was obviously great consternation as to whether they could be kept safe whilst continuing to attend at the workplace.
27. Having exhibited those extraordinary symptoms of coughing the claimant was required to self-isolate. So too was her housemate because of the perceived risk, and the claimant does not take any exception to the fact that that was an appropriate course to be taken and she was not subjected to any disciplinary sanction at that stage.

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28. However having returned from that period of self-isolation on Friday 17 April she attended at her estranged wife's home. It may well be, and again we have no reason to doubt this, that the claimant was acting as her wife's carer. She would therefore be exempt from the general requirement at that stage that you should not visit another household, and there was also of course the need for her whilst her partner was unable to go out to exercise the dogs for their well-being.
29. But the issue was not whether the claimant was complying with the then government guidance that permitted her to visit her wife or to take the dogs out. It is whether having become aware as she reported to colleagues that she had "never seen Diane looking so ill" and "she had the proper virus" she then took the appropriate steps following the employer respondent's advice that she should not then go into work. And the fact is that she did not comply with those instructions repeatedly reinforced orally at regular meetings. She went in on the 20<sup>th</sup>. When it became apparent from her conversations that she had spent a significant time with her partner, again she was advised that she should not have come in. Her colleagues were concerned and understandably brought it to the attention of management so the claimant was again required to self-isolate along with her housemate Eva.
30. On her return from that period of self-isolation on 4 May the claimant was invited to a disciplinary investigation meeting with her immediate line manager, Mr H Lunn. As a result of that the very next day she was invited to attend a disciplinary meeting with Mr Orme. The notice inviting her to that meeting gives no indication that any particular sanction was contemplated. It expressly states that it was not intended at that point to call any witnesses and all the indications are that, although this was a significant breach, it was not at that stage necessarily being viewed as such that would necessarily require serious disciplinary action against the claimant.
31. However at that meeting on 5 May the claimant's attitude was considered to be inappropriate by Mr Orme. He specifically has it recorded in the minutes of that meeting that throughout the claimant was quite aggressive and showed a "couldn't-care-less-attitude". In particular it is recorded that the reason why she had come into work on the earlier occasion having a cough was that she did not want the "earache". That is that she believed that if she phoned in the respondent would not necessarily accept that it would be necessary for her to self-isolate and therefore that is why she took the decision to come in in any event.
32. That of course accords with a view she had similarly expressed to Mr Lunn at the investigative meeting the previous day when she had said she felt like she would be interrogated when questioned and did not want that. That being specifically on that occasion answering Mr Lunn's enquiry as to why she had come in again on 21 April.
33. And specifically in the course of this hearing and answering questions in the course of her evidence before this Tribunal on two occasions in reply to the Judge's she specifically confirmed that she did not wish to experience "earache" as she described it, and it was only later that she sought to resile from that position in her answers.
34. That does appear to give credence to the conclusion of Mr Orme that on 5 May she expressed a "couldn't-care-less-attitude". That is also to an extent corroborated by the evidence of her companion at that meeting, Jennifer Blockley, who gave evidence that she was summarily ordered by the claimant to accompany her to that meeting, although Miss Blockley was not necessarily particularly happy about being asked to do so. She herself was one of those members of staff who had specifically expressed concern that the claimant had been coming in to work having been in the same

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household as somebody exhibiting potentially severe symptoms of Coronavirus was exposing her and her colleagues to danger.

35. That appears to have been the reason why the matter did in fact progress to a more formal disciplinary hearing. It was the concerns about the claimant's attitude and a refusal to accept any potential irregularity in her conduct. She was summoned then to a further disciplinary meeting to be held on 13 May. That was postponed until the 20<sup>th</sup> to allow her companion Mr Bottomley to attend. It is right to note that if that meeting had gone ahead on the 13<sup>th</sup> the respondent, although it had suspended the claimant from 5 May onwards, does not appear at that point to have conducted any more specific investigation. However having delayed the meeting the respondent then did take confirmatory statements from witnesses, the other members of staff who could give information either about the first incident on 26 March or the latter one on 20 April. Those were duly provided to the claimant before the hearing on the 20<sup>th</sup>.
36. It is right to observe however that the minutes of the investigative meeting on the 4<sup>th</sup> and the first disciplinary on the 5<sup>th</sup> were not provided to the claimant. She had however signed the minutes for the 4<sup>th</sup>, she had been present on the 5<sup>th</sup> and neither she nor her companion made any request for those documents specifically to be provided in addition to the witness statements.
37. At the hearing on the 20<sup>th</sup> the claimant made no objection to Mr Orme conducting the hearing. She did object to the witness attendee Mrs Spriggs, but Mrs Spriggs was not an actual participant in the disciplinary hearing. She was there as an appropriate employee at supervisor level, similar to the claimant, to observe the process. Mr Bottomley was not there in a capacity as a union representative and nor indeed was Mr Dambel who then assisted the claimant at the appeal. They were both contacts she had, both members of the CWU but neither of them were in fact ever stated to be accredited officials of the union as defined by section 119 of the Trade Union and Labour Relations (Consolidation) Act 1992 and nor were they certified as authorised to conduct grievance or a disciplinary hearings by the union as required by section 10 of the Employment Relations Act 1998 which gives the right to be accompanied. So though they may well have had significant union experience in the past, and the claimant of course was not herself a member of their union, they were simply attending in a personal capacity. They had no right therefore to be heard in accordance with the 1998 Act nor indeed were they so entitled under the respondent's own disciplinary procedures which simply mirror the wording of the statute.
38. At the hearing on 20 May Mr Orme again confirmed the position and the claimant's essential argument was that because she did not believe she had in fact contracted Coronavirus, despite having been coughing on the 26<sup>th</sup>, and because she believed that she was not in fact any longer part of the same household as her wife, and because she believes she had been observing social distancing she did not believe she was required to follow the respondent's instructions not to attend work.
39. Mr Orme adjourned that meeting to consider the matter and, as necessary, take HR advice. We have his brief contemporaneous notes of his thought processes.. He gave the decision the same day and we have heard that that was at the request of the claimant and Mr Bottomley who wanted to hear the outcome immediately. The decision was that the claimant should be dismissed for gross misconduct. The brief notes that Mr Orme made, which accord with his evidence before us, are that he particularly took account of the fact that the respondent was being monitored by the Health and Safety Executive and there was an instruction to act on employees not following the rules -and that indeed is recorded in the notes of the meeting itself. We

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prefer that account to Mr Bottomley's version, or indeed the claimant's version, that he expressly said that the Health and Safety Executive had given instructions to the respondent to come down heavily on the claimant as an individual.

40. It is certainly a matter in all the circumstances which a reasonable employer was entitled to take into account in seeking to navigate the uncertain times of the early pandemic. As a continuing business they were under scrutiny and they had had an inspection from the HSE towards the end of April. That is shortly before taking the decisions in this case.
41. Also Mr Orme has recorded that there was an issue of trust, that is that after two incidents would others trust her in the workplace or indeed would the respondent trust the claimant. As we have said she was not disciplined after the first incident but it served as a warning. She must have well understood at that point how seriously the respondents viewed their responsibilities and the obligations towards their staff to be ultra-cautious in the time of pandemic, and yet the claimant had still, because she did wish to avoid potential "earache" by phoning in, decided to come into work notwithstanding her association with her estranged wife on the weekend of 17 April.
42. The respondent had recorded the claimant's express lack of concern at the first disciplinary hearing on the 5<sup>th</sup> and this again appears to be confirmed by her reluctance to accept any potential endangerment of her colleagues or the risk, nor any understanding that she had failed to comply with the verbal instructions given very clearly at meetings by her employer. Therefore it is understandable that there was an appreciation on the part of the respondent that the claimant may adopt a similarly incautious approach to any further situation where she was exposed to risk or was potentially exhibiting symptoms.
43. That ties in with the third reason noted briefly by Mr Orme, a lack of acceptance of any error with the whole issue being treated as something as a joke.
44. The claimant appealed. That was heard by the managing director Mr Hesketh. In the course of that appeal the claimant alleged that she had been treated differently and gave the examples of the four comparators to whom we have already referred. Although it was not specifically notified to the claimant that he had done this Mr Hesketh then made enquiries and ascertained the factual situation, as we have already outlined, that indicated that those people were not in the same or not materially dissimilar circumstances to the claimant.
45. The appeal was dismissed. We are satisfied as we have said that this was a dismissal on grounds of misconduct. It has been alleged, though with lack of clarity, that the claimant made accusations in the course of the disciplinary process that she believed Mr Orme to be homophobic and that was why he was targeting her. No such matters are ever recorded in the minutes. None of the people present apart from the claimant states that this happened and indeed in particular at the 20 May disciplinary meeting when the decision to dismiss was taken, it is now conceded by the claimant that she did not make any such specific allegation. Her own evidence is that all she said was that she believes she was treated differently and that was all that she had said. That too now appears to be the position accepted by Mr Bottomley her companion on that occasion.
46. So when, after the outcome of the appeal had been announced on 9 June, the claimant then on 12 June sent an email to Mr Hesketh asking that retrospectively there be an amendment to the minutes of the disciplinary from 20 May to record that she had



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alleged homophobia on the part of Mr Orme, that is in fact inaccurate because no such accusation was ever made on that occasion.

47. Nor do we find that there was any such specific accusation made to Mr Hesketh in the course of the appeal hearing. Mr Damble has suggested that it was said but his evidence we are afraid was not at all clear. His initial stance was that he was alleging there had been differential treatment to the other four people and that is what he viewed as discrimination. It was only later in the course of his evidence that he appeared to be suggesting that it may also have said on behalf of Mrs Bielby that the specific example about less favourable treatment was because of her sexual orientation. We do not accept that was said. Again neither Mr Hesketh nor Mr Cunningham who were present at that meeting say that this was alleged, and nor indeed has the claimant herself specifically made that accusation – it is certainly not made in the pre-prepared statement which she read out at the appeal hearing. Nor was it ever alleged, when the minutes of that appeal hearing were subsequently sent for checking, that they should be amended to record such things having been said. There has never been any suggestion that there was any such comments made at the first investigation on the 4<sup>th</sup> before Mr Lunn. It is only very late in the course of this hearing that Mrs Bielby may have suggested that she said something on the 5<sup>th</sup> but again her evidence is not sufficiently clear that we can rely upon it. It is certainly not recorded in the minutes. It is not agreed by Mr Orme who was present nor by Mrs Spriggs who was the note take on that occasion nor by the claimant's companion Mrs Blockley.
48. But in any event going back to the notes of the case management discussion where the issues were identified the only relevance of any alleged accusations of homophobia in this context is that it suggests that there should have been further enquiry as to whether that was the real reason for dismissal rather than the stated one. The only significance of any alleged homophobic comments as identified in the issues from the preliminary hearing was that they indicate a failure to give proper consideration, certainly at the appeal stage, to that being a true reason for dismissal rather than any actual misconduct. But as we have said Mr Hesketh did adjourn and make those relevant enquiries as to the circumstances of the alleged comparators and they, we accept, disclosed no actual disparity in treatment, such as could render dismissal unfair.
49. In the round we are satisfied that in the extraordinary circumstances pertaining between March and May of 2020 in the early stages of the pandemic, in an effort to ensure the safety of all employees and maintain their confidence in the steps and precautionary measures being taken, and also of course under the watchful eye of the HSE, the respondent was well within the band of responses open to a reasonable employer in treating two breaches of their clear verbal clear instructions on the part of the claimant, who did not then exhibit any understanding of the potential seriousness of her actions, as justifying a decision to dismiss.

### **Breach of contract**

50. In the circumstances we are also persuaded that the respondents have established to our satisfaction that this was therefore gross misconduct justifying dismissal without notice.
51. It is right that by the time of the disciplinary hearing with hindsight it would have become apparent that there had fortunately been no actual risk as a result of the claimant's coughing fit on 26 March and nor indeed as a result of her exposure in the household of her estranged wife a month earlier. But the claimant had nonetheless on

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the clear evidence before the respondents at that stage exhibited an unnecessarily cavalier approach to their instructions not to attend work in circumstances of potential danger. She had not been particularly clear nor consistent in her account as to what had actually happened at Diane's house on the 17<sup>th</sup> and the respondent was entitled to view with scepticism, as they clearly did on their evidence, her account that she had at all times maintained all precautionary measures and appropriate social distancing such that they could have been no risk of transmission of any virus to herself, or through her -even if herself asymptomatic -to her colleagues when she returned to work. As we say these were extraordinary times and in the context of what was happening in the spring of 2020 not only was the respondent entitled to conclude that this was worthy of dismissal but also to conclude that even if in the event it did not result in any actual harm it did expose the workforce to a serious risk to their health, both potentially physically but also, as recorded by the respondents in terms of the psychological reaction of concerned employees, to their mental health at their concerns of how the claimant had conducted herself.

52. So for those reasons we conclude that all complaints stand dismissed and that concludes the case.

EMPLOYMENT JU DGE LANCASTER

DATE 29<sup>th</sup> April 2021

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- 1.1. <sup>i</sup> The claimant was employed by the respondent as a Team Leader and had been employed overall for seven years. In March 2020 she attended work with what colleagues thought were Covid symptoms and the claimant was asked to go home and self-isolate which she did for a week. On her return to work and on 20 April 2020 it again appeared to colleagues that the claimant had Covid symptoms although the claimant will say that her coughing was simply related to her asthma and was not unusual. It is common ground that the claimant told her colleagues that she had recently visited her ex-partner, who she believed had Coronavirus. There will be a dispute as to how much, if any, direct contact the claimant had had with her ex-partner when she went round to her house to provide some household support. In any event, the respondent believed that there had potentially been a breach of the then applicable Covid regulations or restrictions and that the claimant had been irresponsible in coming into work in those circumstances. This led to her suspension and, following a disciplinary hearing on 20 May 2020, her dismissal on the grounds of gross misconduct.
- 1.2. The claimant contends that the real reason for her dismissal was that the dismissing officer, Mr Orme, disliked the claimant because of her sexual orientation and that this was simply an excuse to get rid of the claimant. As the claimant's solicitor has pleaded this, the dismissal was said to be "*because Mr Orme (who is the Operations Director) has a special hate for her. He is a homophobic, as a result, he is not always happy seeing Mrs Bielby around him.*" The claimant refers in her particulars of claim to various employees who she believes also had Covid symptoms but who did not share her sexual orientation and who were not disciplined or dismissed. These are her comparators for the

discrimination case and also are relevant to her unfair dismissal case, where she contends that the respondent treated her and these colleagues inconsistently.

## 2. **The relevant issues**

### Direct sexual orientation discrimination

- 2.1. It must be common ground that being dismissed is less favourable treatment.
- 2.2. Was the claimant also treated less favourably because the payment of wages or sick pay to her for a period of Covid self-isolation was delayed?
- 2.3. In respect of any less favourable treatment found, was that because of the claimant's sexual orientation?
- 2.4. Are Mandy Clayton, Patrick McMahon, Dave Moody, 'Jordan' and/or 'Maria' apt comparators?
- 2.5. If not, would a hypothetical comparator have been treated any differently to the claimant?

### Unfair dismissal

- 2.6. Can the respondent show a potentially fair reason to dismiss?  
The respondent seeks to show the reason of conduct.
- 2.7. If so, was that reason actually fair having regard to the test in the Employment Rights Act 1996 section 98(4) and in particular,
  - Did the respondent have a reasonable suspicion that the claimant had committed gross misconduct?
  - Did the respondent carry out a reasonable investigation?
  - As a result, did the respondent have sufficient material before it to reach the conclusion that gross misconduct had occurred?
  - Did the respondent treat the claimant inconsistently if any of the employees on whom the claimant relies as a comparator had circumstances which were not materially different to those of the claimant and yet were not disciplined or dismissed?
  - Was the decision to dismiss the claimant premeditated?
  - Was the stated reason for the claimant's dismissal a sham?
  - Although it is acknowledged that the claimant did not raise a formal grievance with regard to the disciplinary process begun against her, did Mr Orme give sufficient consideration to the claimant's allegation (if this was made to him) that the real reason that she was being disciplined was her sexual orientation rather than her misconduct? Further, because Mr Hesketh, when conducting the appeal did not give due weight to the claimant's contention or grievance that Mr Orme had dismissed her because of her sexual orientation and his alleged distaste for that?
  - Was the respondent entitled to conclude that the claimant had seriously breached the then applicable Government guidelines for persons who suspected that they had Covid or Covid symptoms?

- Was the decision to dismiss within the reasonable band of decisions which a fair employer could have reached?
- 2.8. If the claimant's dismissal was unfair had she contributed to that dismissal to any extent and if so what? How should that be reflected in terms of remedy?

Wrongful dismissal

- 2.9. Had the claimant committed gross misconduct by attending work on 20 April 2020 in the knowledge that she had been in contact with a person who was assumed to have Coronavirus and at a time when allegedly the claimant herself was suffering from Coronavirus symptoms?
- 2.10. If so, was the dismissal of the claimant without notice or payment in lieu of notice a breach of contract by the respondent?
- 2.11. If so, how should that be reflected in terms of damages?