



EMPLOYMENT TRIBUNALS

Claimant: Miss K Ditchfield

Respondent: Network Rail Infrastructure Limited

HELD AT: Manchester

ON: 17-20 May 2021

BEFORE: Employment Judge Slater
Mrs S A Humphreys
Mr T Walker

REPRESENTATION:

Claimant: In person
Respondent: Ms S Chan, counsel

JUDGMENT having been sent to the parties on 21 June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The hearing was conducted by video conference (CVP).

Claims and issues

2. The claimant claimed direct sex discrimination and harassment related to sex and/or sexual orientation and of a sexual nature. Some amendments to the claim were allowed at a preliminary hearing held on 28 November 2019, the record of which was sent to the parties on 19 December 2019.
3. The claimant had brought a complaint of unfair dismissal but this was dismissed as being presented out of time in a judgment sent to the parties on 19 December 2019.

4. The complaints and issues to be considered by the Tribunal were set out in Schedules to the record of the preliminary hearing sent to the parties on 19 December 2019. A copy of these schedules is annexed to these reasons.
5. Ms Chan confirmed that the respondent was not relying on the statutory defence if the Tribunal found that any of the respondent's employees had committed acts of discrimination. At paragraph 5.1 of the amended Grounds of Resistance, the respondent argued that it was not liable for any acts of discrimination by Mr Mitchell, who was working for the respondent via an agency. Ms Chan informed the Tribunal that the respondent no longer relied on this defence and accepted that it would be liable for any acts of discrimination found to have been committed by Mr Mitchell.

Summary

6. The claimant was the only female operative working in a team of labourers for the respondent, based at its Guide Bridge depot. The claimant is gay. The claimant complained of direct sex discrimination in the provision of toilet and changing facilities and of harassment related to sex and/or sexual orientation and of a sexual nature in relation to comments made to her by male colleagues.
7. The claimant was dismissed before she presented her complaints to the Tribunal for reasons which were not alleged to be discriminatory.

Evidence

8. The Tribunal heard evidence for the claimant from the claimant only and for the respondent from the following witnesses:

Joseph Spiteri-Braysford, Section Manager (Off-Track), the claimant's second line manager.

Edward Helps, Team Leader in the maintenance function.

Alan Lyons, Technician and sometimes acting Team Leader at the time the claimant was employed, and now Team Leader.

James Mitchell, an agency worker contracted on a long term basis to work at the Guide Bridge depot.

There were written witness statements for all the witnesses.

9. The Tribunal had an agreed bundle of documents of 206 pages. During the course of the hearing, the respondent provided the following additional documents:

A 10 page note headed "Kirsty Ditchfield – Investigatory Interview", written by the claimant.

Notes of a welfare meeting with the claimant on 7 February 2018.

Notes of a stage 2 meeting with the claimant on 12 March 2018.

Facts

10. The claimant joined the respondent on 28 September 2015. She initially worked in an office role working in recruitment in HR. On 2 July 2017 she took up a new role as an operative for the Guide Bridge Off Track Team in a general labourer role. She had been interviewed for that role by Mr Spiteri-Braysford. It is common ground that, in that interview, Mr Spiteri-Braysford learnt that she is gay. There is a dispute about whether Mr Spiteri-Braysford asked, during that interview, if the claimant was intending to start a family. This alleged remark does not form the basis of any of the complaints we need to decide so we do not need to make a finding as to whether it was said and do not do so.
11. It is common ground that the claimant was the first female operative in the department employed directly by the respondent. They previously had had some female agency workers but these agency workers did not use the respondent's changing facilities. The agency workers only worked on days, came ready changed for work and were able to use the office ladies' toilet.
12. We find that the claimant had access to the ladies' toilet in the office on the ground floor. We prefer the claimant's evidence to that of Mr Spiteri-Braysford in finding that this access was during the daytime only and that she was not given a key to the office which would have allowed her access to it during the night. We prefer her evidence on this point for the following reasons. A key would have given her access to the whole office area when no one was working there, which we consider makes it unlikely that she would have been given a key. The respondent has not disclosed the log which Mr Spiteri-Braysford said was in existence which would have shown whether or not the claimant had been given a key to that area. As we note later, in relation to a number of matters, we have found the claimant's evidence to be more credible than that of Mr Spiteri-Braysford for the reasons which we will give in relation to those matters.
13. The changing area and men's toilets were found on the floor above the offices, with separate access from the access to the offices. Mr Helps complained to Mr Spiteri-Braysford that the claimant was using the men's toilets, which contained urinals as well as cubicles. His concern was for the privacy of men using the urinals, rather than concern for the claimant. The claimant was not concerned about using the men's toilets provided she was able to lock the individual cubicle that she was using. After Mr Helps raised a concern, a lock was then put on the external door to the men's toilets so the claimant and any other users were able to lock the whole area when they were using the toilets.
14. There is agreement that there was no dedicated female changing area before the claimant started work for the Guide Bridge Team. A separate changing area was created for the claimant, next to the area used by the men. There is a dispute as to whether this changing area was ready for the claimant's start. We prefer the claimant's evidence in finding that she had to share changing

facilities with the men for a period of up to three weeks after starting employment. Once the facilities were in place, we consider that they were at least as good as the facilities available to the men and, in fact, the claimant probably had more space to herself than the men. We found the claimant's evidence to be more credible than that of Mr Spiteri-Braysford in relation to when the facilities were available. As noted previously, in relation to a number of matters, we have found the claimant's evidence to be more credible than that of Mr Spiteri-Braysford for the reasons which we will give in relation to those matters. The others who gave evidence about the changing areas did not have personal knowledge of whether this was ready when the claimant started employment since they were not at work when she started.

15. We find that, in July or August 2017, Mr Helps made a comment that the claimant was not bad for the inferior sex and the claimant told Mr Spiteri-Braysford about this. This was in the context of the claimant and Mr Helps being called into a meeting with Mr Spiteri-Braysford because somebody had overheard them having a heated exchange. Mr Spiteri-Braysford and Mr Helps deny that any of this exchange was because of the alleged comment being made and they deny that such a comment was made. We prefer the evidence of the claimant for the following reasons. The claimant referred to this comment specifically in a meeting on 8 November 2018, which was an investigation into her alleged abusive conduct towards Mr Spiteri-Braysford at a later date. The claimant had no particular motive to raise this comment in the 8 November meeting and could not have anticipated that she would have been talking about these matters. She was speaking about earlier events at the invitation of Alex Peake, the investigator, and, indeed, asked Mr Peake why they were going through earlier matters rather than focussing just on the particular issue that she had understood was to be investigated.
16. We do not find that Mr Helps was seeking to mislead the Tribunal. We consider it possible that Mr Helps did not consider the comment to be of any particular significance and may not have intended to cause any offence by it. If the comment was of no significance to him, it was unlikely that he would remember it some considerable time after the events. However, given that the comment had some impact on the claimant, she was more likely to remember it. The claimant was upset by the comment.
17. The claimant alleges that Mr Spiteri-Braysford laughed off the comment. Having denied that the comment was discussed, Mr Spiteri-Braysford denies that he laughed it off. We prefer the evidence of the claimant in finding that, not only was the comment discussed at the meeting, but that Mr Spiteri-Braysford did laugh it off, leaving the claimant with no confidence that he would take any allegations of discrimination seriously.
18. Around August or September 2017, the claimant suffered an injury at work to her elbow. She was absent from work for some time because of this injury. The claimant says that she did not play football during this absence. Mr Spiteri-Braysford alleges that she played football during that absence and lied about the extent of her injury, given that she was able to play football but was still off work. Mr Spiteri-Braysford referred in oral evidence to him having seen evidence of this on Twitter. We consider it would have been possible for

him to have produced the Twitter posting in evidence if this had supported his version of events but he did not do so. For reasons that we give later, when dealing with a meeting in March 2018, we reject his evidence that the claimant was lying about the extent of her injury. We find that the claimant did not play football during her absence because of the injury to her elbow.

19. After the meeting where the claimant raised the matter of the inferior sex comment, she sought advice from her line manager, Graham Thompson. She was also concerned that she was not being given the same opportunities as men. Mr Thompson gave her the good advice to keep a diary or a log of events. However, the claimant did not do so. Her explanation is that she understood Mr Spiteri-Braysford had concerns about Mr Helps and might be looking for a way to get rid of him and she did not want to get him sacked. The claimant did not raise comments of a sexual nature with Mr Thompson.
20. The claimant complains about various comments of a sexual nature related to her sex and/or sexual orientation throughout her employment. We will come back to our findings of fact in relation to these matters when we have dealt with the rest of the relevant chronology.
21. Mr Spiteri-Braysford, in his witness statement, made a number of allegations about the claimant's conduct. One of these allegations was that the claimant changed in the van in front of others on the way to work at a site and that she changed in the yard. The claimant has accepted that one time she changed her trousers in the van, but not in the presence of other people, when the van was still parked in the yard and she had been told she was wearing the wrong trousers for the particular job. The claimant's evidence is that she did not otherwise change in the van in front of others or in the yard. We prefer the evidence of the claimant to that of Mr Spiteri-Braysford in this respect. There is no support for Mr Spiteri-Braysford's evidence that the claimant changed in the van on the way to site. Mr Lyons' evidence supported that of the claimant.
22. It is agreed that Mr Spiteri-Braysford spoke to the claimant at some time about showing pictures to other people that they considered inappropriate. She said it was nothing inappropriate and her evidence to us has been that she was simply showing a picture of her partner, having been asked to do so and that this picture was not of an inappropriate nature. We have heard no evidence from anyone who had seen the pictures. Mr Spiteri-Braysford did not see the pictures. Mr Spiteri-Braysford has not satisfied us that the claimant did show anybody inappropriate pictures.
23. Mr Spiteri-Braysford also asserts that he reprimanded the claimant for saying to other employees "get your cock out". Mr Spiteri-Braysford did not hear the claimant say this. The claimant denies saying this and denies that Mr Spiteri-Braysford spoke to her about this. We have heard no evidence from anyone that they heard the claimant say this. We prefer the claimant's evidence to that of Mr Spiteri-Braysford in finding that he had no conversation with her about this and that she did not say this to other workers. On other disputed points, in particular the elbow and the football incident and the customisation of the vest, we have found the claimant's evidence to be more credible than

that of Mr Spiteri-Braysford. This assists us in preferring the claimant's evidence to that of Mr Spiteri-Braysford in relation to this matter.

24. Around the end of 2017 and early 2018 a number of events occurred which caused the claimant to have difficulties with her mental health. Her grandfather, who she was very close to, died; she also separated from her long-term partner. She was on sick leave from some time from the end of 2017 until towards the end of February or early March 2018.
25. At a welfare meeting on 7 February 2018, when she was on sick leave, the claimant said that she had been advised to keep things normal and was doing football training. After her return to work, proceedings were taken under the absence management procedure. On 12 March 2018, there was a stage two meeting. At this meeting, Mr Spiteri-Braysford said to the claimant "I've been getting mixed conversations from you though. As part of getting back to normal you went back to your football". The claimant said, "yes just training". Mr Spiteri-Braysford said "but you were playing and even scored a goal – you lied to me – did you, or didn't you?". The claimant said "yes". Mr Spiteri-Braysford relies on this note as support for his assertion that the claimant lied about playing football when she was off work with her elbow injury and lied about the extent of her injury during that time. From what was recorded as being said at this meeting and the preceding welfare meeting, we find that the conversation clearly related to playing during the latest absence (which was for mental health reasons) rather than during the absence in 2017 (which related to the elbow injury). We reject Mr Spiteri-Braysford's evidence that the claimant was lying about playing football and the extent of her injury when she was off work with her elbow injury. The claimant's oral evidence was consistent with the notes of the meetings on 7 February 2018 and 12 March 2018 that were disclosed by the respondent during the course of Mr Spiteri-Braysford's evidence and after the claimant had given her evidence. The conversation at the meeting in March 2018 is ambiguous as to whether the claimant is saying "yes" to having played football and scoring a goal or "yes" to having lied. If this is to be understood as an admission of lying by the claimant, we find that it related to playing football rather than just doing football training.
26. The claimant suffered other problems with family illness and bereavement in March and April 2018 and was placed on anti-depressants.
27. The claimant had, by this time, a poor relationship with Mr Spiteri-Braysford. She did not feel supported by him in relation to her mental health. She is noted as saying this in her disciplinary investigation interview on 10 October 2018 and we accept that this statement correctly reflected her feelings at the time.
28. In around August 2018, the claimant was given a stage three written warning about absences.
29. Sometime in the summer of 2018, it is agreed that the claimant was told she should not wear only a vest on top when she was working on the chipping machine and she was told this by Mr Lyons. It is agreed that she was wearing

a hi vis vest. She was then spoken to about the wearing of the vest by Mr Spiteri-Braysford. We find, based on the claimant's evidence and that of Mr Lyons, that the claimant was wearing a hi vis vest which had been supplied by the respondent. We find that she was not wearing PPE supplied to her but then cut up by her as was alleged by Mr Spiteri-Braysford. His evidence about wearing cut up PPE was a late addition to the oral evidence he gave and we did not find this to be credible, preferring the evidence of Mr Lyons and the claimant in respect of what she was wearing.

30. We find that the claimant was told it was inappropriate to wear only the vest without anything under it. The claimant said she was not told why. The respondent's evidence as to why the claimant was told this is not consistent. Mr Lyons said that the concern was only about the vest not providing sufficient protection when doing the chipping job. Mr Spiteri-Braysford said, in his witness statement, he was not aware at the time of anyone advising the claimant she should not wear a vest but then in oral evidence gave considerable evidence about a conversation he had had with her about this. Mr Spiteri-Braysford said, when he spoke to the claimant, that he had said to her that he had had complaints that she was showing parts of her body that she should not have been. There was also a concern about her being sufficiently protected for the work she was doing. We accept that there was a concern on the part of Mr Lyons and Mr Spiteri-Braysford about protection from brambles etc when wood chipping but we find, based on Mr Spiteri-Braysford's evidence, that there was also a concern about the claimant's breasts being seen when wearing only the vest. The evidence about this matter has been somewhat confused and we do not consider it necessary to make any further findings of fact in relation to this.
31. On 6 September 2018 the claimant was involved in a road traffic accident where the vehicle she was driving hit a stationary vehicle. The claimant accepted in evidence to this Tribunal and previously accepted that she lied initially to Mr Spiteri-Braysford about the matter. We find that she denied that she knew about the damage to the vehicle and that it had hit anything in a short initial call from Mr Spiteri-Braysford of about a minute. The claimant says that there were mitigating circumstances. We accept that the claimant was in a poor state of mental health at the time and was on medication. We also accept that she tried to contact Mr Spiteri-Braysford over the weekend, after having returned to the site of the accident and spoken to the owner of the vehicle she had hit, but Mr Spiteri-Braysford failed to return her calls.
32. On a later date in September 2018, the claimant was suspended following an argument with Mr Spiteri-Braysford in the course of which she called him a "fucking wanker".
33. On 8 November 2018 there was an investigatory meeting into the claimant using foul and abusive language to Mr Spiteri-Braysford. During the course of this interview, which was conducted by Alex Peake, the claimant spoke about issues relating to being the only woman in the department. She spoke about sharing a toilet and a changing room, she referred to sexist comments, giving an example of the comment "you're not bad for the inferior sex". She spoke of telling Mr Spiteri-Braysford about this and him laughing it off. She spoke

about a team member showing his “arse” in the yard. She spoke about females being treated differently to males and comments made about her sexuality, without specifying the comments she alleged to have been made. According to the notes of the meeting, Alex Peake then asked her if she felt like her sexual orientation had been used against her in a discriminatory manner at work and she is recorded as saying she felt it hadn’t been a problem at work as far as she was aware. We find it hard to understand the meaning of this comment in the context of the previous reference by the claimant to comments regarding her sexuality and the claimant has not been able to satisfactorily explain this. Mr Peake did not seek to clarify the answer to his question so we remain unclear about what could be regarded as an inconsistency in what was said there.

34. There does appear to have been some investigation of the allegations the claimant raised in the meeting on 8 November in the context of investigating the allegation against the claimant of foul and abusive language towards Mr Spiteri-Braysford. Mr Spiteri-Braysford told us that Mr Peake spoke to him and took notes of the interview. The respondent had not disclosed these notes. He also thought that Graham Thompson had been interviewed but again we have not been provided with any notes of the interview, if that was the case.
35. There appears to have been no outcome to the investigation by Mr Peake. Mr Spiteri-Braysford told us that this was overtaken by the claimant’s dismissal for failing to report the accident. However, notes from the appeal against dismissal in March 2019 indicate that an investigation was still ongoing at that point and suggest that alleged inappropriate behaviours at Guide Bridge Depot were to be looked at in that the context of that investigation.
36. We note from the respondent’s policies that they express a zero tolerance approach to harassment, stating in the harassment policy and procedure that bullying and harassment will not be tolerated. The Equality, Diversity and Inclusion Policy and Procedure includes an expectation that managers will challenge behaviour or decisions that breach the policy. Given this expressed stance, we would have expected the respondent to continue to look into the allegations of inappropriate conduct even once the claimant had been dismissed and her dismissal upheld on appeal.
37. Following the meeting on 8 November 2018, the claimant prepared a ten-page document ready for the next interview she expected to have in the context of the investigation. This document was not included in the bundle of documents but provided by the respondent during the course of the hearing, understood to be the 10 page document to which Employment Judge Allen referred at the preliminary hearing in November 2019. There was no further meeting with the claimant to ask her about the allegations prior to her dismissal and the claimant did not send this document to the respondent prior to her dismissal. There was no further meeting following her dismissal for the matters relating to the road traffic accident and the claimant was not asked again about her allegations about toilets and changing facilities and comments which she alleged were made to her.

38. At page 2 in those notes, the claimant wrote “following my return to normal work, derogatory comments continued by the male workforce. This included some males feeling it appropriate to show me pornographic images on their mobile phones to encourage inappropriate banter directed at my gender and sexuality”. There was also reference in those notes to a colleague showing his backside in the yard.
39. A disciplinary hearing was held in relation to the road traffic incident on 30 November 2018. The claimant alleged during that hearing that, in her interview, Mr Spiteri-Braysford had asked if she was intending to have a family. She also alleged that there were no female facilities at the depot. She said she had mentioned to Mr Spiteri-Braysford remarks about being female. The claimant said in evidence to this Tribunal that she meant comments from Mr Onorati about not being capable of the work because she was a woman but she did not provide any detail of the alleged comments at that hearing on 30 November. Following a reconvened disciplinary hearing on 2 January 2019, the claimant was dismissed. The dismissal was confirmed by a letter of the same date.
40. As previously noted, an appeal hearing was held on 4 March 2019. At that hearing, there was a reference to there being a separate investigation into misconduct in the course of which the claimant had raised concerns about inappropriate behaviour. The hearing manager noted that he had confirmed with the IMDM that this investigation was ongoing. The claimant’s dismissal was upheld on appeal.
41. Mr Onorati has been on long term sick leave since July 2019 which continues. We find that he was not under investigation for any disciplinary matters and not facing any disciplinary charges when he went on sick leave.
42. We deal now with the facts relating to the harassment allegations which we have not already dealt with. We deal together with the allegations in paragraphs 4, 5, 6, 7 and 9 of Schedule 1 to the notes of the preliminary hearing held in November 2019, other than the vest matter, which is annexed to these reasons. We have the evidence of the claimant who said that these matters occurred. We have the evidence of Mr Lyons and Mr Mitchell, who are directly accused of making some of these comments, that they did not make the comments alleged. We have the evidence of Mr Lyons, Mr Mitchell and Mr Helps who say that they never heard anyone making comments of a sexual nature at work. Mr Onorati was not called to give evidence because he has been on sick leave since July 2019. We have not drawn any inference adverse to the respondent from the failure to call him as a witness.
43. The claimant said there was inappropriate content shared in What’s App groups of which she was a member for a time, for the purpose of arranging nights out. However, she lost her phone before the end of her employment and, therefore, is unable to supply copies of the relevant messages. The respondents’ witnesses denied that there were any What’s App groups. We, therefore, have no documentary evidence of pornography being shared.

44. Ms Chan made detailed submissions over eleven points as to why we should not believe the claimant's evidence. We deal with these in turn before making our findings of fact.
45. The first submission made by Ms Chan was that the claimant never raised a grievance or a complaint about any of these matters. It is correct that the claimant did not make any formal complaint or grievance about harassment and, indeed, appears not to have raised any informal complaint about the various comments of a sexual nature until the meeting on 8 November 2018. It is also correct, as Ms Chan points out, that the claimant was aware of the HR policies, particularly having worked for a period in HR, albeit on the recruitment side. The claimant said in evidence about using the grievance procedure, that it is different when it's you. The claimant did not even raise a grievance when disciplinary proceedings were started against her and she had trade union representation. There could be a number of explanations for this. An explanation given in the further and better particulars is that, since she was new and not being taken seriously, she felt it best to just get on with it and she had to work with the lads every day and did not want to grass. However, by the time that she was under investigation and facing disciplinary proceedings which could result in her dismissal, the claimant would have had nothing to lose by raising a formal grievance, or by being specific about the allegations she had. Nevertheless, she did not raise a formal grievance. However, we note that she did raise in generic terms allegations at the 8 November meeting which cover the scope of the allegations of harassment. She understood, up to her dismissal, based in part on the assurance at the appeal hearing in March 2019, that the respondent, in the context of an investigation of her conduct against Mr Spiteri-Braysford, was looking into allegations of inappropriate behaviour at the Guide Bridge Depot.
46. Ms Chan's second point is that the claimant was advised by Mr Thompson to keep a diary or log of events but did not do so. The claimant has provided an explanation in relation to why she did not do this relating to Mr Helps but this does not explain why she did not start logging details if there were further events of real concern. Mr Thompson had given good advice. The claimant had not told Mr Thompson of concerns about sexual comments. Had she done so, we would have expected Mr Thompson to do more than simply advise her to log matters. It would, no doubt, have been of great help to the claimant in these proceedings had she created a diary or log of events. However, we are unable to conclude that the claimant's version of events is not credible because of the failure to do so.
47. Ms Chan's third point was that there was no good reason why the claimant could not have gone to a trade union representative, such as Mr Proctor, at an earlier stage and asked for help if she had serious concerns about harassment. We are not clear from the evidence at what point the claimant joined the trade union, if indeed she did join the trade union. It is true that she was represented by trade union representatives at the investigation meeting and the disciplinary hearing in November 2018 and the appeal hearing. However, she gave evidence that she had not been a member, at least at an earlier stage. She also said that, when she got to know about local trade union representatives, she was concerned about them being too close to

people involved. Mr Proctor was in a different category in that he worked in HR and had been her boss when she worked there. The claimant was not asked why she did not go to Mr Proctor earlier, so we do not know the answer to that question. We do not consider that this assists us in determining the credibility of the claimant's evidence.

48. Ms Chan's fourth point was that the claimant did not raise matters with Mr Spiteri-Braysford. However, as we have already found, she had a poor relationship with him, dating back to his laughing off the inferior sex comment. When she raised that, she did not feel that he took matters seriously. We do not consider this point assists the respondent in our assessment of the credibility of the claimant's evidence.
49. Ms Chan's fifth point was about a complete lack of specific details or particulars on many repeated opportunities to give the particulars. She referred to the ten-page document prepared in November 2018. However, this document does refer, in generic terms, to comments that had been made. It referred to derogatory comments, although that may have related to the inferior sex comment and comments linked to the feeling that she was not getting the same responsibilities as men. However, on page 2 of those notes, as previously quoted, the claimant has referred to pornographic images being shown and inappropriate banter directed at her gender and sexuality. That is wide enough to cover the majority of the harassment complaints; the reference to derogatory comments in relation to her sex would cover the other matters. It is true that the ten page document does not set out all the detail of the allegations the claimant now makes. However, if it was to serve as an aide-memoire for her to use when next interviewed, we would not necessarily expect her to have set out all the detail in that document.
50. Ms Chan's sixth point is about what she says are the ways in which the claimant's case has become embellished as time has gone on. The claimant raised matters in a generic sense, as we have already referred to, in the investigation meeting with Alex Peake on 8 November 2018. She was raising matters in response to an invitation from Mr Peake. Indeed, she questioned why they were going into this. Mr Peake was saying to her that he wanted to go through the whole timeline to get a picture of why the event with which they were concerned happened. It does not appear, therefore, that the claimant anticipated being asked about these matters and would not have prepared to provide details of complaints. There is no record of Mr Peake asking her for more details. She referred in general terms to comments about her sexuality, although this does not assist us as to what the detail of those comments were. The mention, albeit in generic terms, in the notes of the meeting with Mr Peake, assists the claimant's case. She was saying at this time, in response to Mr Peake's invitation, that there was something of a sexual nature going on. The respondent's witnesses have denied that any such remarks were being made.
51. At the disciplinary hearing on 30 November 2018, the claimant does not give details of these allegations but that is a disciplinary hearing about the accident. It is perhaps not surprising that the claimant does not talk about

allegations of sexual harassment in that context since this would not seem to be relevant to the issues that were being discussed at that meeting.

52. In the claimant's claim form, she makes generalised allegations which we consider to be wide enough to cover the allegations of harassment with which we are concerned at this hearing. The claimant subsequently particularised her claim more in the further and better particulars in October 2019. We do not draw any negative inferences relating to the claimant's credibility from the way that the claimant's claims have been particularised over time. There is no inconsistency between what the claimant has said at various stages; she has particularised the complaints that were made in a more general way at an earlier stage. This is not uncommon in the Tribunal's experience, particularly with an unrepresented claimant.
53. The claimant's witness statement does include some completely new matters. We refer, in particular, to paragraphs 10 and 15. We will not make findings of fact on these completely new matters; however, we do not consider that the fact that she has mentioned these count against the claimant in assessing the credibility of her evidence. Again, we consider it not uncommon, particularly with an unrepresented claimant, to find that new evidence emerges at the stage of the witness statement or even later at the hearing. We do not, therefore, agree with Ms Chan's submission that the way the complaints were identified over time is not consistent with the claimant giving a genuine and credible account of events to the Tribunal.
54. We turn next to point seven made by Ms Chan. Point seven was a lack of corroboration. Ms Chan refers to the claimant having said that certain things were said in the hearing of Mr Spiteri-Braysford and that Mr Spiteri-Braysford phoned Mr Onorati when the claimant complained about Mr Onorati getting his rear end out but Mr Spiteri-Braysford has not corroborated either of those matters. Ms Chan also refers to a lack of corroboration from the team; she would have expected others to have heard comments but they have not corroborated this. We do not find a lack of corroboration by the respondent witnesses to be surprising. Indeed, given their wholesale denial of the allegations, we would be surprised to get corroboration from those accused of misconduct. We do not find this to be a strong point against the claimant's credibility.
55. Point eight is in relation to the claimant's credibility and honesty, there being two instances where the claimant admitted to being dishonest. The claimant has accepted that she lied to Mr Spiteri-Braysford in that first telephone conversation about the road traffic accident. This is a matter that we need to take seriously. However, we would not draw from that instance alone that we were not able to rely on anything that the claimant said.
56. We have dealt in some detail with the matter of the alleged lying in relation to playing football and the extent of the elbow injury. We found that the claimant did not lie in relation to the extent of her injury to her elbow and that she was not playing football at that time, which is what Mr Spiteri-Braysford accused the claimant, during this hearing, of doing. If there was a lie, and as we have noted there is some ambiguity in the way the matter is put in the notes of

March 2018, the lie was in relation to whether the claimant was playing, as opposed to training for, football, which we do not consider to be of very great significance. The claimant had been clear in the welfare meeting that she was being advised to keep things as normal as possible and that she would be doing football training. As a result, we do not consider that moving on to play a match, when she was not absent from work because of a physical injury, is of great distinction from training for football.

57. We turn now to submission point nine, which relates to the part of the investigatory interview notes, which we have quoted previously, about whether the claimant felt her sexual orientation was being used against her. As we have previously noted, there are two potentially inconsistent statements within the same paragraph of these notes and the questioner does not clarify what was meant. The claimant's explanation to us as to that final sentence was not satisfactory but we find it hard to know from the notes what was meant given the preceding allegations made by the claimant and the lack of follow up clarification by the questioner. We do not find that this assists us in determining the credibility of the claimant's evidence.
58. We turn to point ten of Ms Chan's submissions which is about the respondent being hampered by the lack of particulars as to the individuals involved and the time when various incidents occurred. We accept that the lack of specification as to who was responsible for all the alleged comments could have caused the respondent some difficulty in preparation for this hearing. However, the claimant had identified at the preliminary hearing the small number of employees who were involved, so the respondent was able to call those to give evidence (other than Mr Onorati who was unable to attend due to illness). All, other than Mr Onorati, were able to respond. The witnesses responded more widely than they needed to do in relation to Mr Helps, since the claimant clarified in the course of her evidence that allegations were not made against Mr Helps other than in relation to the inferior sex comment. We do not consider, given the nature of the comments and the allegation of them being on a continuing basis, that the lack of dates would cause any problems for the respondents. If the respondent witnesses never did the acts that they were alleged to have done, they could say, as indeed they did, that they never did things of that nature and it would have made little, if any, difference to their evidence whether they had known what particular date or dates the conduct was alleged to have taken place.
59. Submission eleven is the potential motivation for the claimant making the allegations. Ms Chan suggests that the claimant was motivated to make allegations against the particular employees because they had given witness statements against her in relation to the road traffic matter. We find, however, that the claimant had raised the allegations, albeit in generic terms on 8 November 2018 but she did not see the witness statements until she was sent them on 15 November 2018 with the invitation to the disciplinary hearing. We also do not consider that the witness statements of Mr Lyons, Mr Mitchell and Mr Helps were of such a damning nature as to provide any motivation for the claimant to seek retribution by making false allegations against them. Indeed, Mr Lyons and Mr Mitchell said that they were not in the yard when she returned and did not see her return, so they say little, if anything, which was to

the claimant's detriment. There was also a witness statement taken from another employee against whom the claimant makes no accusations.

60. Having considered those submissions, we consider whether to accept the claimant's evidence in preference to that of the respondent's witnesses in relation to the harassment allegations, other than the vest matter and the inferior sex comment which we have already dealt with. We consider that the mention by the claimant, albeit in generic terms, of this type of allegation in the investigation meeting on 8 November 2018 assists the claimant. She had no particular reason to raise those allegations at the time if they were not genuine concerns. In her ten-page note prepared after that meeting, she also refers to what she describes as inappropriate banter related to her sex and sexuality. This supports her evidence. The respondent has conducted some investigation into the claimant's allegations made in the meeting on 8 November but has not disclosed notes taken during that investigation. Contrary to the impression which was given in Mr Lyons' witness statement, we find that there was plenty of opportunity in the working day for conversations of the nature described to take place, when travelling there and back to site in the van and during breaks which were often taken together in the van at lunchtime.
61. Points against the claimant include that she did not present any complaint or grievance before the 8 November. The claimant has given some explanation in her further particulars as to why she did not do that.
62. A serious matter weighing in the balance against the claimant's account is that she has admitted to lying on at least one other occasion, that being in relation to the road traffic crash. However, if a person lies about one matter, that does not necessarily mean that they lie about other matters. For reasons which we have given previously, in relation to the allegation about lying about the extent of the elbow injury and the alleged customisation of the vest, we have found the claimant to be a more credible witness on some points than Mr Spiteri-Braysford.
63. Against the claimant is the evidence of Mr Lyons, Mr Mitchell and Mr Helps. Mr Lyons and Mr Mitchell are directly accused of some of the allegations of harassment and they deny that they made comments of the nature alleged. All three witnesses deny ever hearing comments of a sexual nature. However, there is a clear motive for the respondent's witnesses not to admit to the conduct alleged. If they did, that would be detrimental to them, given the respondent's expressed stance in relation to harassment.
64. Taking these things all together, we prefer the claimant's account of events to that given by the respondent's witnesses. We rely particularly on the references in the 8 November meeting and the ten page document and the lack of a motive for the claimant in raising matters at that time. Since the respondent's witnesses have given a wholesale denial of any of the matters alleged by the claimant occurring, we prefer the claimant's evidence on all the allegations of harassment. We find that matters set out in paragraphs 4, 5, the part of paragraph 6 which does not relate to the vest (which we have dealt

with separately), and paragraphs 7 and 9 of Schedule 1 occurred as alleged by the claimant. We find that the following occurred:

- a. Mr Lyons, Mr Mitchell and Mr Onorati saying: “get your tits out”.
 - b. Mr Onorati saying “you’ve never had a real man, that’s why you’re a lesbian”.
 - c. Mr Onorati and Mr Lyons asking the claimant how she did it (sex with a woman), asking if she was good and could she teach them a few things.
 - d. Mr Onorati commenting “would mind them tits” [we consider this may have been intended to read “wouldn’t mind them tits”].
 - e. Mr Onorati, Mr Lyons and Mr Mitchell talking about who had the biggest penis in the yard.
 - f. Mr Onorati asking the claimant, in relation to other women, if “I would lick her out”.
 - g. Mr Onorati telling the claimant, in relation to a specific fencing job: “no offence, but it’s not a woman’s job”, suggesting it was too heavy or hard for the claimant.
65. We find that (a) to (f) above occurred on a continuing basis throughout the claimant’s employment until her suspension from work.
66. We find that the conduct was unwanted and made the claimant feel uncomfortable. She did not make that known at the time because she was trying to fit in.

Submissions

67. Ms Chan and the claimant made oral submissions which were carefully thought out and presented. The fact that the Tribunal did not agree with some of the submissions made by Ms Chan is no reflection on the quality of those submissions.
68. The claimant on occasions began to tell the Tribunal about new factual matters in her submissions. The judge informed the claimant that the Tribunal could not make findings of fact based on matters raised in submissions rather than in evidence.
69. In relation to the complaints of direct discrimination, Ms Chan asked the Tribunal to find that the claimant had access to the office toilets at all times and also, that she had access to the male toilets and that using these did not cause her a problem. She submitted that the claimant was not treated less favourably than the men in relation to use of the toilets. Ms Chan asked the Tribunal to find that the claimant had access to separate changing facilities from the start of her employment but submitted that, even if there was a delay of a few weeks, there was no less favourable treatment. Ms Chan submitted

that the Tribunal had no jurisdiction to consider the complaints of direct discrimination which were presented out of time.

70. In relation to the harassment allegation relating to the vest, the respondent admitted that the claimant was asked to put on a T shirt. Ms Chan submitted that this treatment did not relate to a protected characteristic; it was for the claimant's protection. If the claimant did feel irritated by the comment, it was not reasonable for the claimant to feel that the comment created an intimidating, hostile, degrading, humiliating or offensive environment for her.
71. The respondent denied that the "inferior sex" comment was made. If the Tribunal found it was made, the complaint was presented out of time.
72. Ms Chan made detailed submissions about the facts relating to the remaining complaints of harassment. We have addressed these submissions in our findings of fact.
73. The claimant made oral submissions to the effect that the Tribunal should prefer her version of events to that of the respondent. She submitted that, because she is gay, she was treated like a man in relation to sexual innuendo. This was not wanted by her or warranted. The claimant said she had provided her witness statement before she knew Mr Onorati would not be attending as a witness; she had not tried to pin issues on him because he was not here to defend himself. This was not about getting her own back because of interviews in relation to the accident. She had raised issues on 8 November 2018, before she was sent the letter with the witness statements. She raised issues because they made her feel inadequate and embarrassed. The claimant said she had come to the Tribunal to prove that discrimination happens. She wants other people to be open and confident in not allowing things like this to happen.

The Law

74. The law in relation to direct discrimination is contained at Section 13 of the Equality Act 2010.
75. Section 13(1) of the Equality Act 2010 (EqA) provides: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". Section 4 lists protected characteristics which include sex and sexual orientation.
76. Section 23(1) EqA provides that "on a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."
77. The provisions relating to harassment are contained in Section 26 of the Equality Act 2010. There are a number of parts of this section which are of relevance in this case. Subsection 1 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

78. Subsection 4 directs us that in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect. Relevant protected characteristics for harassment include sex and sexual orientation.
79. Subsection 2 of Section 26 provides that A also harasses B where A or another person engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect which I referred to in relation to the previous subsection.
80. The time limit provisions in the Equality Act provide that a claim must normally be presented within three months beginning with the act of discrimination, with a possible extension for the effects of early conciliation. If early conciliation is started before the end of the primary time limit, the period of conciliation will extend that time. If there is a continuing act of discrimination, then all matters which form part of that continuing act of discrimination will be in time if the last complaint was presented in time. The Tribunal can consider a complaint presented out of time if it considers it just and equitable to do so in all the circumstances. The onus is on the claimant to convince the Tribunal that it is just and equitable to extend time, but the Tribunal must consider whether it was just and equitable having regard to all the relevant circumstances, taking a multifactorial approach in which no single factor is determinative.

Conclusions

The complaints of direct discrimination

81. These complaints relate to the provision of changing and toilet facilities. We deal both with matters of jurisdiction and the merits of the complaints. We have concluded that we do not have jurisdiction in relation to these matters having regard to the relevant time limits. These allegations are different in nature to the other allegations of harassment. We do not consider that there is any basis for saying that these matters form part of a continuing act with the later matters of harassment ending at or shortly before the claimant's suspension. The complaints are not, therefore, presented in time. We do not consider there is any basis for us to consider it just and equitable to extend time. The claimant has not provided us with any material on which we could reach the conclusion that it would be just and equitable to extend time. We, therefore, have no jurisdiction to consider the complaints of direct discrimination. Nevertheless, we have gone on to consider what we would have decided if we had jurisdiction to consider the complaints.
82. In relation to the changing facilities, although we accepted that the claimant had to share the changing facilities for the first three weeks, this was the same for the men and for the claimant working at the same time. They all had to share the same facilities. After a few weeks, the claimant had her own separate facilities. We consider that the men and women were treated the same in relation to the changing facilities. There was no less favourable treatment because of sex and the complaint would have failed on its merits for that reason.

83. In relation to the toilet facilities, the claimant was able to use the office downstairs toilet during the daytime and then was able to use the gents' toilets both before and after a lock was put on that. The claimant had said that she was not bothered about using them before the lock was put on. We consider that there was no less favourable treatment and that complaint would have failed on its merits had we had jurisdiction to consider that complaint.

Harassment

84. We deal first with the allegation about Mr Helps saying that the claimant was not bad for the inferior sex. We have found, as a fact, that that was said. However, this occurred early on in the claimant's employment and the complaint was presented considerably out of time. We consider that it does not form part of a continuing act with later acts of discrimination. It involved Mr Helps, who is not accused of any other act of discrimination. The nature of that act is very different in nature to the other allegations of harassment. We find no basis for concluding it would be just and equitable to extend time to allow the complaint to be considered so we do not have any jurisdiction to consider that complaint. If we had had jurisdiction to consider the complaint, we would have found that comment was related to sex and that it was unwanted. The claimant took offence at that, complaining to Mr Spiteri-Braysford and Mr Thompson. We would have found that the comment had the effect of creating a hostile, degrading, humiliating or offensive environment for the claimant and that it was reasonable for the claimant to take that view. Had it not been for the jurisdictional point, we would have found that complaint to be well founded.
85. We move on next to the allegation relating to being told to wear something under the vest. This took place in the summer of 2018. The complaint is presented considerably out of time. We consider it is of a different nature to other allegations of discrimination, so we do not find that it forms part of a continuing act of discrimination with later acts of discrimination. We do not consider there to be any basis on which to conclude that it would be just and equitable to consider the complaint out of time. We do not, therefore, have jurisdiction to consider the complaint.
86. If we had had jurisdiction to consider the vest incident, we would not have found that it was harassment as defined in section 26. We found that, in part, the request for the claimant to wear something else was because she had been showing her breasts by wearing the vest. Although it clearly related to sex and the claimant may well have found the request or instruction to be unwanted, if it did have the requisite effect of violating her dignity and/or any of the other effects referred to section 26(1)(b), we do not consider it would have been reasonable for the conduct to have that purpose or effect. We consider it was a reasonable request to cover up if, inadvertently, the claimant was showing her breasts.
87. We move on then to the other allegations. We have found, as a matter of fact, for the reasons we have given, that the matters set out in Schedule 1 at paragraphs 4, 5, the remaining part of 6, 7 and 9 occurred as alleged.

88. Allegation 4 is in two parts. The first is an allegation against Mr Lyons, Mr Mitchell and Mr Onorati about “get your tits out”. That is related to sex and of a sexual nature and had the requisite effect to satisfy the definition of harassment. It had the purpose or effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her and it was reasonable for the claimant to form that view.
89. The second part of allegation 4 is the comment: “you have never had a real man that is why you are a lesbian” which we found to be said by Mr Onorati. That relates to sexual orientation and for the same reasons as in relation to the first part of allegation 4, it satisfies the other parts of the definition of harassment.
90. The allegation at number 6 concerns comments which we have found to have been made by Mr Onorati: “would [not?] mind them tits”. The comment relates to sex and is of a sexual nature and satisfies the other elements of the test of harassment.
91. We have found that Mr Onorati, Mr Lyons and Mr Mitchell told the claimant about who had the biggest penis in the yard. We consider that to be conduct of a sexual nature and to meet the other requirements of the definition of harassment.
92. We have found that Mr Onorati asked the claimant, as alleged in paragraph 7 about another woman “if I would lick her out”. We conclude that the remark relates to sexual orientation and is also of a sexual nature. We conclude that the remark had the requisite effect to satisfy the definition of harassment.
93. In relation to allegation number 9, we found that Mr Onorati said, in relation to a specific fencing job, “no offence but it’s not a woman’s job ” at the end of April or start of May 2018. We conclude that the comment related to sex and had the requisite effect to satisfy the definition of harassment.
94. We conclude that the comment “no offence but it’s not a woman’s job” is of a different type to the other allegations of harassment. We conclude that it does not form part of a continuing act of discrimination with later acts. The complaint is brought out of time and we do not consider there were any just and equitable grounds on which to extend time. We conclude that we do not have jurisdiction to consider that particular complaint.
95. In relation to the other matters, those at paragraphs 4, 5, 6 and 7 we consider that those taken together form part of a continuing act of discrimination and accept the claimant’s evidence that they continued up to or shortly before her suspension. Based on the judgment of Employment Judge Allen at the preliminary hearing in November 2019, the Tribunal has jurisdiction to consider those complaints.

Employment Judge Slater

Date: 1 June 2021

REASONS SENT TO THE PARTIES ON

21 June 2021

FOR THE TRIBUNAL OFFICE

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ANNEX

SCHEDULE 1

Further particulars of the claim for which leave has been given for the claimant to rely upon as amendments to her claim

Facilities

1. When starting the role I was forced to share a changing room with the men due to there not being any female changing facilities. From being offered the role and starting, it was four weeks, so something should have been put in place. It took around four weeks for this to change by them putting a door up the fire escape corridor and a locker and this became my new changing room but was not secure as there was no key to lock the room up. This became an issue which was raised when my personal belongings were being removed and hidden around the depot, which was raised but other than finding my stuff myself nothing else was done.

2. Once the changing area had been created it then became an issue in the depot that I did not have my own toilet and that I should not be using the bathroom as there were urinals. Nothing was done about this for a week or two after union intervention, to which the solution of Joe Spiterie Braysford was to put a lock on the inside of the doors so I could lock it when using it. However, having so many men on shift this was hard. The only female toilet was in the main office downstairs which was only available when on day shifts, not at night.

Harassment

3. Upon starting I was subject to a lot of discrimination with Eddie [Healps] saying I am not bad for the inferior sex whilst with management, to which nothing was said it seemed to just be brushed off.

4. Every day working there something would be said to me either "get your tits out" or "you've never had a real man that's why you're a lesbian".

5. Being asked how I do it (sex with a woman), am I good, can I teach them a few things.
6. In 2018 as the summer approached and weather got hotter I wore vests, which I was then advised I could not wear as I needed long sleeves on (which I was unsure as to why), but I did have a lot of comments off the lads like “would mind them tits”, and people telling me who had the biggest penis in the yard.
7. Vito [Onorario] asked me [about someone else] if “I would lick her out”.
8. The comments were most days.
9. I was told that some work was too heavy or hard for me by Vito [Onorario] who said “no offence but it’s not a woman’s job” about a specific fencing job – that was in the end of April or start of May 2018.
10. The people alleged to have made the comments are the following: Vito [Onorario] (although the claimant is uncertain about the spelling of his surname); Alan Lyons; James Mitchell and Eddie [Healps]. The comments made were alleged to have continued throughout the claimant's time working at the Guide Bridge depot up until September 2018.

SCHEDULE 2

ISSUES

Direct discrimination because of sex (section 13 Equality Act 2010)

1. Was the claimant treated less favourably in relation to the provision of facilities? That is: not being provided with any changing facilities; having to share those allocated to men; having facilities that were not secure; and being required to share male toilets when working on night shift and between 3.00pm and 4.00pm on day shift?
2. Was that treatment less favourable on the grounds of sex? That is, did the respondent treat the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances?
3. If so, was this because of the claimant’s sex?

Harassment (section 26 Equality Act 2010)

4. Did the respondent engage in the conduct alleged (more particularly detailed in Schedule 1)?
5. If so, was that conduct unwanted?

6. If so, did it relate to sex and/or sexual orientation, and/or was it conduct of a sexual nature?

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

8. Were all of the claimant's complaints presented within the time limit set out in section 123 of the Equality Act 2010 (taking into account that it has already been determined that it is just and equitable for the claimant to have an extension of time to enter claims arising from matters which occurred in or around 6 September 2018, or to conduct extending over a period which ended at that time)? Dealing with this issue will involve consideration of when the act occurred, whether there was conduct which extended over a period, and whether it would be just and equitable to extend time.

The claimant contends that all of the allegations of harassment are on the grounds of either or both sex and/or sexual orientation, save for the comments made in relation to a job being too heavy or hard for the claimant which were made in relation to a specific fencing job which were harassment on the grounds of sex only.

Remedy

9. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and, in particular if the claimant is awarded compensation and/or damages, will decide how much should be awarded.