EMPLOYMENT TRIBUNALS

Claimant: **Miss L Lawrence**

Respondent: **Q7 Group Ltd t/a Bundles of Joy Day Nursery**

Heard at: **London South Employment Tribunal, by CVP**

On: **18 and 19 August 2021, in chambers 20 August 2021**

Before: Employment Judge Dyal, sitting with, Dr Von Maydell-Koch and Ms O'Hare

Representation:

Claimant: in person

Respondent: Mr Hussain, Consultant

RESERVED JUDGMENT

1. The complaints are not well founded and are dismissed.

REASONS

The issues

1. The Claimant drafted the claim form herself and in it gave few details. At a Preliminary Hearing on 12 July 2019 she was ordered to clarify what claims she was pursuing and to provide further particulars of them. Some of the Claimant's complaints were made the subject of a deposit order at that hearing. The Claimant did not pay the deposit and those claims that were subject to it were struck-out.

2. The Claimant's response to the orders to clarify her claims and provide further particulars eventually came in the form of a document she titled '*list of issues*' (p42). At the outset of the hearing we spent over an hour identifying the issues.

We used the Claimant's list as a starting point. Ultimately, with one exception (see below), we were able to agree a list of issues. That which was agreed is reflected below:

Direct sex discrimination, s.13 Equality Act 2010 (EqA)

1. Did the Respondent treat the Claimant less favourably than it would have treated a relevant hypothetical male comparator and if so was that because of sex?

2. The treatment complained of is:

    a. Mrs Zara Ahmed said the Claimant's breasts were too big;
    b. The Respondent failed to give the Claimant the company uniform, i.e., a polo shirt with logo on it.

Victimisation, s27 EqA

3. The Claimant relies on the following protected acts:

    a. A grievance complaint of 10 January 2019;
    b. The discussion of those complaints in the grievance meeting of 12 February 2019;
    c. Mrs Ahmed becoming aware/concerned that the Claimant could bring proceedings against her by reason of the above complaints.

4. The detriment complained of is:

    a. After the Claimant raised the grievance on 10 January 2019, Mrs Ahmed rota-ed the Clamant for two days work for the following week. Usually the Claimant worked three or four days. The Claimant complained and the hours reverted to normal [*NB*. *we spent a particularly long time identifying this issue and confirming both when it was said to have occurred and that the Claimant was not saying that her hours were in the event actually cut on this or any subsequent occasion*.]

Harassment, s26 EqA

5. Was the Claimant subjected to unwanted conduct? The conduct complained of is:

    a. On several occasions in December 2018 and early January 2019, Mrs Ahmed said her breasts were too big, used gestures to make the same point and said that the Claimant's dress might offend other people.

6. Was the conduct related to sex and/or was it of a sexual nature?

7. Did the conduct:

    a. violate the Claimant's dignity; and/or
    b. create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (a proscribed environment for short).

3. The exception referred to above is that the Claimant also sought to pursue a further allegation of victimisation detriment. Namely, that Mrs Ahmed cold shouldered her by not greeting her in the mornings, not dealing with any requests she made and referring her instead to Mr Ahmed. We considered that this complaint was not included in the claim form nor in the Claimant's list of issues (which contained her further particulars). It was raised on the morning of the hearing for the first time. We treated her request to rely on these matters as an application to amend. We considered the application and refused it for reasons we gave orally at the time.

The hearing

4. *Documents before the tribunal*:

    (a) Agreed bundle running to 120 pages plus four additions (pages 45.1-45.6, 60.1 – 60.4, 70.1 – 70.6, 113.1);
    (b) Email from the Claimant to the tribunal of 18 August 2021 timed at 23:05. This included two timesheets;
    (c) Witness statement of Zara Ahmed;
    (d) Witness statement of Qaiser Ahmed;
    (e) Witness statement of the Claimant (see further below);
    (f) Witness statement of Sulayma Francis;
    (g) Witness statement of Jayde Neil.

5. *Witnesses*:

    (a) The Claimant did not prepare a witness statement in advance of the hearing despite the case management orders which indicated that she must do so if she wanted to give evidence. We heard submissions about how best to deal with this. We decided that the best course was to give the Claimant time on the first day to produce a witness statement. We gave her from 11.40 am (the moment we finished discussing all preliminary issues so were able to break) to 3.45pm. In the event she served the statement at about 4pm and we accepted it. The Respondent was able to consider the statement over night to prepare for cross examination. This was ample time as the statement was short and raised few matters that had not previously been foreshadowed. We also allowed Mr Hussain to ask supplemental questions of his witnesses in light of any new matters.
    (b) All witnesses save for Ms Francis gave oral evidence and were cross-examined.

6. *Submissions:*

   (a) At the conclusion of the hearing both sides made closing submissions. We considered the submissions carefully. The Claimant largely repeated her witness evidence. Mr Hussein largely focussed on the findings of fact he invited the Respondent to make.

Findings of fact

7. The tribunal made the following finds of fact on the balance of probabilities.

8. The Respondent operates a small chain of nurseries. At the relevant times it was owned by Mrs Zara Ahmed and Mr Qaiser Ahmed. They have more recently sold the business.

9. The Claimant's employment began in August 2018. She was employed as a nursery nurse at the Streatham nursery ('the nursery'). At her job interview, which was conducted by Mrs Ahmed, it was agreed that she would work in the pre-school room.

10. The nursery was small. At the outset of the Claimant's employment it was managed by Ms Jayde Neil. However, Ms Neil had some personal issues and soon asked to be demoted to a nursery nurse role. A new manager was appointed. That manager was dismissed in December 2018 following a disappointing Ofsted report. Thereafter Mrs Ahmed became the nursery manager and in that capacity the Claimant's line manager.

11. It is, because of the issues in the case, necessary to say something of the Claimant's anatomy. She has a larger build including large breasts. She said in evidence that she wears a large or extra-large. For some perspective and context, her build is far from unusual and well within the normal range. She is, for instance, able to buy clothes in ordinary high street shops and, on her own account, her build does not interfere with normal day to day activities.

12. The Respondent has a uniform and appearance policy. It provides as follows:

    1) Bundles of Joy Nursery have a uniform that all staff are required to wear. This is a pink polo shirt, black trousers and suitable flat shoes that can be easily removed to enter in / out of baby room. (Trainers are not permitted). Staff may wear a black full sleeve top under the uniform shirt or a black cardigan on top of it in the winter months.
    2) A uniform polo shirt will be provided to you when you start work. Additional shirts cost £10.00 per shirt and can be purchased from your line manager. All staff except for managers are expected to wear a uniform shirt to work.
    3) Managers uniform is smart suit or a blouse with skirt or trousers. This is of any colour of your choice.
    4) All staff with hair shoulder length or longer must have it tied back at all times. This is to prevent it falling in to children that may be cuddled or from falling in to food. Also hair must be natural colours such as blonde, brown, black, ginger. Other bright unnatural colours such as pink, green, blue etc. are not

allowed in nursery as these colours may cause offence or be regarded as inappropriate by our service users.

5) *…*
6) *Finger nails must be short (cut back to finger tips) so that you do not scratch a child when handling a child or changing a nappy. Also nail varnish is not permitted whilst you are on the premises as this can chip and fall in to food that we cook and serve the children.*
7) *…*
8) *…*
9) *If you are not dressed in the appropriate uniform or do not adhere to any of the above, your line manager will l ask you to leave the premises and return when you are complying with our uniform code.*

13. The Claimant was not provided with a uniform polo shirt. The Respondent did not have any left in her size. In principle it catered for both large and small sizes (and everything in between). In practice, it was out of stock of both large (sizes 16 – 20) and small (size 8) sizes. This was true throughout the duration of the Claimant's employment. The Respondent was in the habit of placing orders for uniform in batches (because it was cheaper to do so) and only did so when it had few items left. It was well stocked in the sizes between 8 and 16 so, during the Claimant's employment, did not order more stock.

14. Mrs Ahmed did offer to give the Claimant's a pink polo shirt that did not have the Respondent's logo on it. The Claimant declined this, preferring to wait for a logo-ed polo shirt and in the meantime wear her own clothes. We accept that the Claimant asked for a uniform polo shirt several times.

The dress

15. The Claimant wore the same dress to work most of the time. She paired it with black tights. It was, in her words, a basic stretchy black dress. We would add that it was cut with a scoop neck. We have seen various images of the Claimant wearing the dress (from CCTV footage stills) and it was figure hugging dress. Because of the nature of the dress, the amount of the Claimant's body that it covered depended on what the Claimant was doing. The dress could ride up her legs, making it quite short. It could also ride down on the chest thus appearing quite low cut revealing some of the Claimant's cleavage. As the Claimant herself explained, the amount of cleavage that could be seen depended also upon what bra she was wearing and what she was actually doing, since some bras and some movements would push her breasts up in which case more cleavage would be visible.

16. We note that being a nursery nurse is a fairly active job and involves moving around with children and sometimes bending down/over. At times this would mean that more of the Claimant's cleavage would be visible.

17. Overall, we find that the combination of the Claimant's body shape, the size, material and cut of the dress together with the work of a nursery nurse, meant that at times a significant amount of cleavage would be visible.

18. All that said it is also important to emphasis and the dress itself was unremarkable. It was not intentionally low cut or short.

8 January 2019

19. On 8 January 2019, Mrs Ahmed decided that the Claimant should move from the pre-school room to the toddler room. This was because a new member of staff had been appointed as the lead for the pre-school room. This was initially communicated by telephone and the Claimant was unhappy. It was therefore agreed that she and Mrs Ahmed would discuss the matter in a meeting later that day.

20. As a result of the nursery's poor Ofsted inspection the nursery received additional support from the local authority, Lambeth Council. On 8 January 2019, Ms Maxine Henry, an early years specialist employed by the council visited the nursery. She interviewed all staff including the Claimant and also spoke to Mrs Ahmed. The Claimant was wearing the dress that day.

21. Ms Henry did not directly say anything to the Claimant about her attire. However, she advised Mrs Ahmed to have a word with the Claimant about it because she considered that the amount of cleavage that was visible was unprofessional in a nursery environment and could cause offence.

22. At lunchtime, after Ms Henry had left, Mrs Ahmed had a one to one with the Claimant. The agenda for the meeting had initially been to discuss the change of room; but following Ms Henry's advise, Mrs Ahmed decided to raise the Claimant dress with her. The door between the office and the nursery was left slightly ajar.

23. There is a dispute of fact about what was said at the meeting. The Claimant says that Mrs Ahmed said to her that her 'boobs were too big' and made a gesture indicating breasts (moving her hands up and down in the breast area).

24. Mrs Ahmed, says that she did not make that comment or gesture but rather that she told the Claimant that the dress was too low cut, was unprofessional and could cause offense.

25. We have considered this matter very carefully and conclude that Mrs Ahmed did not tell the Claimant that her 'boobs' or breasts 'were too big'. She told the Claimant that she had too much breast on show, that this was unprofessional and could cause offense and that Ms Henry had raised the matter. Mrs Ahmed found this awkward to say, struggled for the right words and in the course of that made the gesture to indicate breasts using her hands.

26. We make these findings based upon:

    (a) our assessment of the oral evidence we heard;
    (b) the content of the notes of the meeting of 8 January 2019;
    (c) the fact that the Claimant's grievance of 10 January 2019 (see below) did not allege that Mrs Ahmed said her breasts were too big. She

alleged that Mrs Ahmed had said "*I have too much breast on show and it may offend parents / staffing or may be deem in appropriate*".

(d) the fact that the notes of the grievance meeting record no allegation that Mrs Ahmed said the Claimant's breasts were too big, although they do record the Claimant saying that Mrs Ahmed made a gesture to indicate breasts;

(e) the grievance outcome letter from Mr Ahmed (who dealt with the grievance) characterised the allegation as Mrs Ahmed telling the Claimant that she had *"too much breast on show".* This suggests that this is what the Claimant alleged when talking to him at the grievance meeting;

(f) the Claimant responded to the grievance outcome letter in writing in some detail. She did not suggest that her allegation had been misstated and that in fact Mrs Ahmed had said her breasts were too big;

(g) in her claim form the Claimant's complaint is that Mrs Ahmed said that she had "*too much breast on show and it may offend parents/staffing and any visitors and may be deemed inappropriate*".

27. There is also a dispute about whether or not the meeting was held in private. The Claimant says that as the door was ajar and the office was immediately adjacent to the nursery, the conversation could have been overheard. She does not know whether it was actually overheard or not.

28. On this matter we prefer Mrs Ahmed's evidence. Her evidence was that at the time of the meeting she and the Claimant were the only staff in the building and that the children were napping. There was nobody immediately outside the office and nobody could therefore have overheard.

29. It is important for us to state that in our judgment 8 January 2019 was the only time that Mrs Ahmed spoke to the Claimant about having too much breast on show and the only time she said anything about the Claimant's breasts:

(a) That was Mrs Ahmed's evidence;

(b) Notwithstanding what is alleged in the list of issues, that was also the Claimant's evidence. She confirmed in cross examination that 8 January 2019 was the first time that Mrs Ahmed raised the matter and there is no suggestion that Mrs Ahmed raised it subsequently;

(c) We reject Ms Neil's oral evidence. Ms Neil said that Mrs Ahmed had told her several times that the Claimant's breasts were too large and that she had told the Claimant this. We think that if this were true, firstly Ms Neil would have put this evidence in her witness statement (she did not). Moreover, secondly, it would have been reflected in the Claimant's evidence which it was not.

(d) The Claimant took immediate offence to the comment Ms Ahmed made on 8 January 2018 about having too much breast on show and made this clear at the meeting itself. She then raised a written grievance two days later. If Ms Neil's evidence were accurate, the Claimant would surely have mentioned this in her grievance, claim form or witness evidence – but she did not.

30. As noted above, on 10 January 2019, the Claimant raised a grievance about, among other things, Mrs Ahmed's comments in the meeting of 8 January 2019.

Working hours

31. The Claimant complains that her working hours were altered as a result of this grievance. It has been very hard to follow the detail of this complaint. On the first morning of the hearing (as we identified the issues), when pressed for the detail of the complaint, the Claimant said that: after raising her grievance the rota for the following week was produced by Mrs Ahmed and this showed her as working only two days not her customary three or four days. She therefore complained about this to Mrs Ahmed and Mrs Ahmed amended the rota restoring her customary three or four days. We asked whether on any other occasion there was an issue with working hours/rota and she said there was not.

32. The Claimant's overall position on this matter is confused and confusing:

    (a) There is no reference to the point in the claim form;
    (b) In her own draft of the list of issues she says "*my hours at work were cut whilst no other members of staff had their hours cut and there was no explanation*". If anything this implies that her hours were in fact reduced rather than simply that they were briefly shown as reduced on a rota before being restored upon her complaint;
    (c) In her witness statement, the Claimant suggests that her hours were reduced on 28 February 2019. This is confusing as 28 February 2019 was not the week following the grievance. More confusing still, the witness statement says nothing at all about the rota for the week following the grievance nor a complaint about this, nor the hours initially lost then being restored. It does say at paragraph 12 "I lost hours and therefore my finances were dramatically decreased". This implies hours were actually lost which differs from the complaint in the list of issues.

33. We also note that, notwithstanding the Claimant's evidence that her usual working days were three or four per week, her hours in fact habitually fluctuated, both before and after she raised a grievance. Her working time varied widely depending upon her own needs to take time off (her son had various hospital appointments for instance) and the Respondent's needed. The Claimant's payslips show:

    (a) in the month to 7 September she worked 35 hours
    (b) in the month to 8 October she worked 75 hours
    (c) in the month to 7 November she worked 5 hours
    (d) in the month to 6 December she worked 49.75 hours
    (e) in the month to 7 January she worked 52.5 hours
    (f) in the month to 8 February she worked 44.92 hours
    (g) in the month to 6 March she worked 64.25 hours and
    (h) in the month to 8 April she worked 61.25 hours
    (i) in the month to 7 May she worked 73 hours
    (j) in the month to 6 June she worked 41.5 hours

34. This tends to undermine and confuse the evidence that the Claimant did give that she lost hours and her "*finances were dramatically decreased*".

35. Overall, we are not satisfied on the balance of probabilities that the Claimant's hours were initially cut and/or then restored after she raised her grievance. There is an inadequate evidential basis for us to make that finding and the quality of the Claimant's evidence on this topic is too poor to rely upon.

Grievance process and end of employment

36. The Claimant's grievance was ultimately passed to Mr Ahmed and a grievance meeting was arranged to discuss the matter. There was some delay in convening the meeting but it eventually took place on 12 February 2019 chaired by Mr Ahmed.

    (a) At the meeting the Claimant repeated the complaint that Mrs Ahmed had said to her she had too must breast on show, that this was inappropriate and could offend others visitors or parents. She said that her breasts had not been on show.
    (b) The Claimant also said that Miss Ahmed had made a gesture by moving her hands up and down above the breasts.

37. Mr Ahmed produced a grievance outcome letter 15 February 2019. The Claimant responded to Mr Ahmed's letter by letter dated 20 February 2019.

38. The Claimant resigned in May 2019 on one weeks notice. We have not seen the letter of resignation. Her employment ended on 16 May 2019.

39. Towards the end of the Claimant's employment the Ahmeds were actively looking to sell their business. This had nothing to do with the Claimant or her case.

Law

Direct discrimination

40. Section 13 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."*

41. Section 23 EqA provides:

> *(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.*
> *(2) The circumstances relating to a case include each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability…*

42. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case

is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

43. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

> *'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*
>
> *The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'*

44. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

> *'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'*

45. Matters are, however, admittedly more complicated in 'dress/appearance-code' code sex discrimination cases.

46. The first case of significance is ***Schmidt v Austicks Bookshops [1996] 1 ICR 868*** (EAT). ***Schmidt*** was analysed and applied in ***Smith v Safeway Plc*** **[1996] ICR 868** in which Philips LJ ruled that the principles of law to be derived from it were as follows:

a. a *difference* of treatment is not necessarily *less favourable* treatment (876G-H – 877A);
b. in order to determine whether or not an employer treats one of the sexes less favourably it is necessary to consider its dress/appearance code as a whole, i.e., take a 'package' approach. However, a single provision of the code can have the effect of unbalancing the code overall such that it treats one of the sexes less favourably (877B-C).
c. a code which applies a conventional standard of appearance is not in and of itself discriminatory (877F-H - 878A-D);
d. looking at the code as a whole, neither sex must be treated less favourably as a result of its enforcement (878E).

47. The matter was revisited by the EAT in ***Department for Work and Pensions v. Thompson***, [2004] IRLR 348, Keith J presiding. The EAT allowed the employer's appeal on the basis that the tribunal had applied the wrong test. The correct test was expressed as follows (at para 30):

> *...whether, applying contemporary standards of conventional dresswear, the level of smartness which [the employer] required of all its staff could only be achieved for men by requiring them to wear a collar and tie… The issue is not resolved by asking whether the requirement on men to wear a collar and tie meant that a higher level of smartness was being required of men rather than women. It is resolved by asking whether an equivalent level of smartness to that required of the female members of staff could only be achieved in the case of men, by requiring them to wear a collar and tie.*

Harassment

48. 22. Section 26 EQA 2010 provides:

> (1) A *person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant characteristic, and*
> *(b) the conduct has the purpose or effect of –*
> *(i) violating B's dignity, or –*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B [for short we will refer to this as a "proscribed environment"].*
> (2) A also harasses B if –
> (a) A or another person engaged in unwanted conduct of a sexual or that is related to gender reassignment or sex,
> (b) the conduct has the purpose or effect referred to in (1)(b),
> *…*
> *(4) In deciding whether conduct has the purpose or effect referred to in subsection*
> *(1)(b), each of the following must be taken into account –*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether* it is reasonable for the conduct to have that effect."

49. In ***Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

> *"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."*

50. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

> 15…*A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."*
>
> *22…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"*

51. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

52. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristics is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The

Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

53. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

54. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

> *[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.*
>
> *[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.*
>
> *[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.*

Victimisation

55. Section 27 EQA 2010 provides as follows:

> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because–*
> *(a) B does a protected act, or*

(b) A believes that B has done, or may do a protected act.
(2) Each of the following is a protected act –
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

56. In ***Chief Constable of the West Yorkshire Police v Khan*** [2001] IRLR 830 Lord Nicholls said *"The primary object of the victimisation provisions is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so."*

57. In ***Aziz v Trinity Street Taxis Ltd*** [1988] IRLR 204, at 29, dealing with the Race Relations Act equivalent to section 27(2)(c) EQA 2010:

> *"An act can, in our judgment, properly be said to be done 'by reference to the Act' [the Race Relations Act] if it is done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act."*

58. The putative discriminator has to have knowledge of the protected act. See, for example, ***South London Healthcare NHS Trust v Al-Rubeyi*** at UKEAT/0269/09/SM.

59. An unjustified sense of grievance cannot amount to a detriment: ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285).

The burden of proof

60. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

61. The effect of these provisions was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> 'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> "56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.
>
> 57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"

(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."
>
> He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

62. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

63. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

64. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Discussion and conclusions

Direct sex discrimination

65. The first complaint is that Mrs Ahmed told the Claimant that her breasts were too big. This complaint must fail because our finding is that Mrs Ahmed did not say this.

66. What Mrs Ahmed did say was that the Claimant had too much breast on show. She said this once, on 8 January 2019. For completeness we analyse this comment.

67. The reason why Mrs Ahmed made this comment was to enforce a dress code. She was prompted to raise the issue with the Claimant when she did because Ms Henry had advised her to that very day.

68. The Respondent has a uniform policy which provides for a conventional but conservative way of dressing (company polo shirt, trousers and flat shoes, coupled with natural looking hair colours, short nails and minimal if any jewellery). The Claimant did not have the uniform polo-shirt and was allowed to wear her own clothes instead. However, the dress she wore, at times showed a significant amount of her cleavage and was thus out of keeping with the conservative dress standards.

69. The conservative standard of dress that was required was well within the range that we would typically expect to see in a nursery setting: in that sense it is conventional.

70. The dress code itself was not discriminatory between men and women. The actual uniform was gender neutral and in our view the Respondent would have applied the same standard to departures from the actual uniform (when employees wear their own clothes) whether dealing with a man or a woman. The standard was to dress conservatively and without exposing bodily flesh that would be inconsistent with conservative dress.

71. Thus if a hypothetical male employee had worn clothes that revealed more of his body than was consistent with a conservative standard of dress, he would have been treated in the same way.

72. It is difficult to make a precise comparison between the Claimant and a man because men and women have different anatomies. However we have tested our view that this matter was not because of sex and that the same standards would have been applied to a man against a number of possible comparisons:

    (a) A man wearing a shirt with so many of the buttons undone that a lot of his chest was visible. We think he would have been asked to cover himself up by doing his shirt up;
    (b) A man with a large build, whether because very muscular or overweight, wearing a shirt that was too small for him so that a lot of his flesh that would ordinarily be covered (e.g. the chest or tummy) could be seen. We think he would have been asked to wear a more appropriate shirt that covered/fit him properly;

(c) A man wearing lycra shorts or leggings that showed the outline of his genitals. He would have been asked to wear something more modest.

73. In summary then, no part of the reason for the treatment of the Claimant was sex; rather it was to enforce conservative standards of dress which themselves were not discriminatory. The treatment was necessary to enforce the dress standards.

74. The second complaint of direct discrimination is that the Respondent did not give the Claimant a uniform polo short. The reason why the Respondent did not do this was not sex, or in any part sex, but rather:

(a) it did not have the Claimant's size in stock;
(b) in order to save money it only ordered uniform in batches;
(c) since sizes between 8 and 16 were well stocked it did not place any order;
(d) latterly, the Ahmeds were looking to sell the business and for that reason also did not want to invest in new uniforms, not least since the new owner may want to change the name/logo of the nursery.

75. A hypothetical male employee would have been treated in the same way. If the Respondent had not had his size in stock, it would not have ordered a logo-ed polo shirt in for him, rather it would have allowed him to wear his own clothes. If those clothes had violated the conservative standards of dress and Ms Henry had picked Ms Ahmed up on it, she would have taken this up with the hypothetical man.

Victimisation

76. We find that the Claimant's grievance of 10 January 2019 and her discussion of it in the grievance meeting were both protected acts. Although she did not complain of sex discrimination in terms or refer to the Equality Act 2010, it was tolerably clear that she was alleging that the Respondent may be in breach of the Equality Act 2010. The terms of her complaint were consistent with an allegation of harassment related to sex. She was expressing offence about a workplace comment related to her breasts.

77. Mrs Ahmed probably did appreciate that the Claimant might do a further protected act, in the form of a tribunal complaint. We infer this from the fact that the Respondent immediately sought assistance from a legal adviser to deal with the grievance (that is not a criticism).

78. Based on our findings of fact the Claimant was not subjected to the detriment complained of, namely, Mrs Ahmed initially reducing her working hours to two days in respect of the week following the grievance. Our finding is that that detriment did not happen.

79. Even if that detriment did happen, we are satisfied that it had nothing to do with the Claimant's grievance. Rather, the Claimant's working hours regularly fluctuated for benign reasons (her needs and business needs) and a benign reason accounts for any change of hours here.

Harassment related to sex

80. The conduct complained of is that on several occasions between December 2018 and January 2019, Mrs Ahmed said:

    (a) the Claimant's breasts were too big;
    (b) used gestures to make the same point;
    (c) said that her dress might offend other people.

81. Our findings as above are

    (a) Mrs Ahmed never said that the Claimant's breasts were too big;
    (b) on one occasion, 8 January 2019, Mrs Ahmed said that the Claimant had too much breast on show and said that the Claimant's dress might offend other people. Mrs Ahmed did, in the course of doing that, make a gesture to indicate breasts. This was because she was feeling awkward and was struggling to articulate herself; it was a difficult conversation to have.

82. This conduct was indeed unwanted. Although it was not because of sex, it did relate to sex which is a much wider test. It related to the Claimant's breasts, which are a part of the female anatomy.

83. We accept that the Claimant took offensive to the comment and that in her view it was an inappropriate matter to raise.

84. However, in our view, notwithstanding the Claimant's opinion which we take into account, in all the circumstances it would not be reasonable to regard this conduct as creating a proscribed environment nor as violating the Claimant's dignity:

    (a) The Respondent was entitled to have a conservative dress code and the code it in fact had was unexceptional. This was a nursery setting where a conservative form of dress is typical;
    (b) It is relevant that the Claimant had not been provided with the company uniform. However, it does not follow that she was therefore entitled to wear whatever she wanted. The Respondent was still entitled to ask her to wear something that was more conservative and thus in keeping with the company uniform/dress standards;
    (c) It is understandable that the Claimant was taken aback since she had worn this dress many times before without any adverse comment. However, this is well explained - and was well explained to her at the time - by the fact that the advise from the local authority expert, who was there to give the nursery guidance on standards and improvements, was that Mrs Ahmed should raise the matter;
    (d) The way in which the issue was raised is important. It was raised privately and discreetly in the nursery office. We have found that the conversation was not one that could have been overheard;
    (e) It is also important that the issue was raised with a light touch. The Claimant was not disciplined in any way, she was just asked to wear something that showed less of her breasts;

(f) Part of the reason why the Claimant took offence, in our view, is that she misunderstood what Mrs Ahmed was saying. In her mind, Mrs Ahmed was implying that the Claimant's breasts were too big. That would indeed be offensive but it is not what Mrs Ahmed said or implied.
(g) The gesture was not at all offensive. It was a natural part of communication in which Mrs Ahmed was stumbling to say something because it was awkward and uncomfortable to say it.

85. Finally, we do not accept that the conduct was of a sexual nature. It is obvious that not every reference to breasts is of a sexual nature. The neither the references here nor the gesture were in any way of a sexual nature. Mrs Ahmed was simply asking the Claimant to wear something that covered up more of her breast in order to maintain professional standards and to avoid possible offence to others. It all about dressing more modestly; it had did not have any sexual nature.

Conclusion

86. Although the claims must be dismissed we do have some sympathy for the Claimant. She did in part misunderstand what Mrs Ahmed was getting at – she thought Mrs Ahmed was implying that her breasts were too big, though Mrs Ahmed was not. That was an honest mistake. But moreover, the matter would not have arisen if the Claimant had simply been provided with company uniform. By the time the events in question occurred she had been employed by the Respondent for over three months. That was plenty of time to sort the uniform situation out and it is unimpressive therefore that it was not.

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Employment Judge Dyal
Date: 20 August 2021