EMPLOYMENT TRIBUNALS

Claimant: **Miss Z. Alia**

Respondent: **Tesco plc**

Heard at: **East London Hearing Centre (by CVP)**

On: **7 – 9 April 2021**

Before: **Employment Judge Massarella**
Members: **Mr M. Rowe**
Mr P. Lowe

Representation
Claimant: Mr N. Shah (Solicitor)
Respondent: Mr H. Zovidavi (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant's claims of direct sex discrimination and harassment related to sex are not well-founded and are dismissed.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. By a claim form, presented on 10 September 2019, the Claimant, Miss Zara Alia, complained of unfair dismissal, sex discrimination, and unpaid wages. In its ET3, the Respondent contended that there was no dismissal, the Claimant having been reinstated on appeal; discrimination was denied, and jurisdictional issues raised.

2. On 13 December 2019, the Claimant lodged a document called 'Replacement Grounds of Claim'. There was no longer an unfair dismissal claim; the focus was exclusively on direct sex discrimination, with the particulars of claim set out in the form of seven discrete allegations.

3. A preliminary hearing for case management was listed for 18 December 2019 before EJ Barrowclough. The claims of unfair dismissal and unauthorised deduction from wages were dismissed on withdrawal; the replacement grounds were accepted as an amendment to the Claimant's claim; and the Respondent was given permission to lodge an amended ET3. The sex discrimination claims were clarified as claims of direct discrimination and harassment. The case was listed for final hearing on 9-11 December 2020, and case management orders made.

4. On 26 September 2020, the Respondent wrote to the Tribunal pointing out that witness statements had not yet been exchanged and attaching a joint application for the December 2020 hearing to be extended to six days. That application came before me and, in an order of 20 October 2020, I refused it, on the basis that it was made too late, the Tribunal did not have capacity to add three days to the current listing, and a six-day hearing could not be accommodated before December 2020. I directed that the case would proceed as listed, but would consider liability only. The parties were ordered to agree a timetable to conclude evidence and submissions within the time available.

5. On 22 October 2020, the Claimant applied to amend her claim, to add further factual allegations. On 26 October 2020, the Respondent objected. An urgent telephone preliminary hearing came before EJ Burgher on 20 November 2020. The application was refused, and further case management orders made to ensure that the parties were ready for the hearing in December 2020.

6. Unfortunately, the Claimant suffered a bereavement and, on her application, REJ Taylor postponed the final hearing to the current dates.

7. On 7 December 2020, the Respondent applied for an order for the Claimant's witness statement to be edited to remove material relating to her unsuccessful application to amend. The Respondent again asked for the hearing to be extended to five days. That application came before EJ Crosfill, who observed that an additional two days could not be accommodated, and that a postponed hearing would not now be relisted until mid-2022. He ordered the Claimant to remove any irrelevant evidence from her statement.

8. On 18 February 2021, the Respondent wrote to the Tribunal contending that the Claimant had not complied with that direction. I listed the case for a one-hour telephone preliminary hearing, which took place on 16 March 2021. On 9 March 2021, the Respondent presented a costs application in relation to the Claimant's conduct over the witness statement. The preliminary hearing went ahead before EJ McLaren, who allowed the Respondent's application and required the Claimant to omit paragraphs 56-58 and 61 of her statement. The Respondent indicated that it did not intend to pursue its application for costs at that hearing.

9. The issues, therefore, remained as originally defined by EJ Barrowclough; they are annexed to this judgment. At the beginning of the hearing, Mr Shah

confirmed the identities of the alleged discriminators; he also confirmed that the harassment claim was pursued exclusively in relation to the events of 2 January 2019.

The hearing

10. At the hearing we had an agreed bundle of around 500 pages. We were also taken to four short videos, consisting of CCTV footage, recorded on 2 January 2019.

11. We heard evidence from the Claimant. For the Respondent we heard from: Ms Fiona Eadon (checkout assistant at the Respondent's Hackney store); Mr Mark Pascoe (store manager in the Barking store); Mr Henry Saunders (store manager in the Bromley-by-Bow store); Ms Amal Narayanasamy (store manager in the Harrow store); and Ms Stacey Wright (people manager).

12. Despite the parties' concerns about the length of the listing, with the assistance of the advocates we were able to complete the evidence and submissions, deliberate and reach our decision within the allocated time. Both representatives made oral submissions, to which we had regard when reaching our conclusions. We are grateful for their assistance.

13. The Tribunal apologises to the parties for the delay in sending out this judgment. This was caused by pressure on judicial resources and the competing demands of other cases.

Findings of fact

14. The Claimant commenced employment with the Respondent on 25 September 2013 as a customer assistant; she later became a supervisor. She was appointed as a service manager at the Hackney Metro store on 17 October 2017.

15. Her line manager was the store manager, Mr Pascoe. In her witness statement, the Claimant made a number of allegations of poor conduct by him, predating the events which gave rise to these proceedings. None of them were pleaded; none of them were properly particularised; and none of them were put to Mr Pascoe by Mr Shah in cross-examination. In the circumstances, the Tribunal concluded that there was insufficient evidence for it to make findings in relation to them.

<u>The events of 2 January 2019 (Issues A and H)</u>

16. The Claimant was duty manager at the Hackney store on 2 January 2019. Her shift was from 6 a.m. to 3 p.m.

17. The CCTV footage (Video 1) showed the Claimant on the shopfloor, shortly after her shift ended. The shop was busy, and all the nearby tills were staffed and serving customers. The Claimant approached her colleague, Ms Shelley Johnson, who was serving at one of the tills. She moved towards Ms Johnson in the area behind the till, where customers could not go; it would have been immediately apparent that she was a member of staff, even though she was not in uniform.

18. The Claimant was agitated and unsteady on her feet. She spoke to Miss Johnson several times and was evidently communicating something urgently to her.

19. She then moved away from Ms Johnson. She was speaking loudly, gesticulating forcefully, and appeared angry and upset. At certain points, she swore in front of customers. Several customers turned from their shopping to watch her, surprised by her behaviour. Her behaviour was also observed by another checkout assistant, Ms Eadon, who was working on a nearby till.

20. A number of witnesses, including Ms Johnson and Ms Eadon, gave evidence in the internal investigation that the Claimant smelt of alcohol.

21. The Claimant walked away from Ms Johnson and out of the picture towards the office. Shortly after that her colleagues, Mr Sheraz and Mr Kamal Hussain (with whom the Claimant was friendly), followed her.

22. Mr Arif Khan had taken over as duty manager at 3 p.m. He was called to speak to the Claimant. He suggested she go home because her shift had finished. The Claimant agreed that, initially, Mr Khan tried to persuade her to leave, without commenting on her behaviour. She refused to do so and went upstairs to the toilets.

23. Mr Khan followed her upstairs and, when she came out of the toilets, he told her that she should go home because she appeared to be drunk. The Claimant again refused and went downstairs. Mr Khan followed her and was joined by Mr Hamza Moudade (security officer), Mr Hussain and a store detective, Kevin (surname unknown). All of them tried to persuade the Claimant to go home, because she appeared to be drunk. She refused. This conversation took place in a corridor.

24. Mr Khan went to find Ms Eadon and asked her to join him as a matter of urgency; he wanted a female member of staff to be present, which was usual practice. Ms Eadon tried to persuade the Claimant to go home; she also told her that she appeared to be drunk.

25. The Claimant adamantly refused all requests. Her behaviour became increasingly agitated and, at points, aggressive. She later accused her colleagues of acting in an aggressive and intimidating manner towards her; we find they did not.

26. Mr Khan decided to call the police. Two female police officers attended fairly quickly and tried for around twenty minutes to persuade the Claimant to go home, but without success. These events in the corridor lasted in total for around 45 minutes. There was no CCTV footage of them; the only camera nearby is fixed on the door of the cash room. We accept Mr Pascoe's evidence that he checked this footage, but it showed nothing material.

27. The CCTV Videos 2 and 4 then show the police officers physically escorting the Claimant through the stockroom. She was resisting vigorously. Ms Eadon, who was looking after the Claimant's bags, went ahead of them with Mr Khan to open the shutters to the goods entrance, so that the officers could take the Claimant out to the back of the store.

28. The CCTV Video 5 then shows a group consisting of the Claimant, Ms Eadon and Mr Khan (the former wearing a Tesco uniform, the latter a Tesco fleece), the two police officers and the security guard, standing in a courtyard outside the back of the shop, giving directly onto the street. The Claimant continued to behave in a highly agitated manner, remonstrating with the police officers. The security guard can be seen taking hold of the Claimant's arm on two occasions. We find that on one occasion he was trying to stop her from wandering into the road; on the other, he was trying to draw her away from the police officers, whose hands she was trying to take. In both instances he was trying to prevent from doing something obviously dangerous or inappropriate.

29. At one point the Claimant walked backwards into the middle of the road, gesticulating back towards the group in a challenging manner. At another point she crossed the road, heedless of traffic, directly into the path of a young couple pushing a pram. Eventually, the police officers persuaded the Claimant to allow them to drive her to the station, so that she could make her way home.

30. The Claimant accepted in cross-examination that she behaved 'slightly aggressively' at certain points, and that her conduct on that day might bring Tesco into disrepute 'to some extent', given that the first and last parts of the events in question took place in full view of members of the public. She accepted in cross-examination that, given her conduct on the day, Mr Khan, Ms Eadon and Kevin had reasonable grounds for believing that she was drunk, and acknowledged that she was shocked when she first saw the CCTV.

<u>The alleged filming of the events on 2 January 2019 (Issue H)</u>

31. The Claimant's evidence in her witness statement was that, when she later saw the CCTV, her trade union advisor pointed out a passage in Video 5, which he thought suggested that Mr Khan had filmed her on his mobile phone outside the back of the store.

32. The only evidence of this is the passage in the CCTV film itself. It shows Mr Khan holding his phone to his chest with his arms crossed; that is not inconsistent with him filming the Claimant. On the other hand, it shows him turning his back on her a number of times; that is inconsistent with him filming her. Mr Khan did not submit any film to the internal investigation; there was no suggestion that any film had been posted online, or otherwise circulated or seen by anyone, including the Claimant. On the balance of probabilities, we find that Mr Khan did not film the Claimant on his mobile phone; the Claimant and her representative misinterpreted the relevant passage in the video.

33. During cross-examination the Claimant broadened her allegation and said that she had seen Mr Khan filming her earlier on, when they were in the corridor (where there was no CCTV coverage). She said that Mr Khan 'had the phone in my face'. We reject that evidence. It is inconsistent with the evidence in her own statement that she first suspected that Mr Khan might have filmed when she saw the CCTV, and that she was shocked when she saw it. Plainly, she would not have been shocked if she already knew he had been filming her earlier on. We concluded that the Claimant was embellishing her evidence; this undermined her credibility on other issues.

The investigation and the written statements (Issue C)

34. On the same day Ms Eadon made a written complaint about the Claimant's behaviour. She described the events, observed that the Claimant seemed to be drunk, and stated that customers on the shopfloor had commented critically on the Claimant's behaviour. On his return to work, Mr Pascoe began a disciplinary investigation, and asked others, who had been present, to provide accounts in writing. Ms Johnson and Mr Hussain both produced statements, in which they said they believed the Claimant had been drunk.

35. The Claimant alleged that Mr Pascoe had inappropriately influenced witnesses to say that she was drunk. She clearly could not accept that witnesses would have given such evidence voluntarily and believed that they must have been suborned. There was no evidence to support that belief. By contrast, there was ample evidence to support the witnesses' belief that the Claimant was drunk, not least her erratic behaviour, as captured on CCTV. The Claimant accepted in cross-examination that they had reasonable grounds for their belief. We find that Mr Pascoe did not influence witnesses.

36. There was also a signed statement from Mr Moudade, in which he wrote that he thought the Claimant was drunk. The Claimant alleged that the statement was fabricated. It was put to Mr Pascoe in cross-examination that it was he who had fabricated it. The evidence relied on in support of that allegation was a WhatsApp conversation between the Claimant and Mr Moudade, in which Mr Moudade denied making a statement. The Claimant then replied by sending him a screenshot of it. The exchange continued [*original format retained*]:

> 'M: What is this?
>
> C: They said u wrote this. Who's lieng? You or managers?
>
> M: Zara I have write everything to you know, and I wish to write like this [*followed by two laughing emojis*].
>
> C: Now you know. So you see how managers told me you wrote this… if they lied to me.
>
> M: Anyway no more writing Zara I call you later.'

37. This was a serious allegation of fraud, and the burden was squarely on the Claimant to prove it. She did not call Mr Moudade to give evidence that the statement was not his; she told the Tribunal that she had been unable to contact him; we found this implausible, given that she clearly had his telephone number (we did not accept her evidence that his number had changed). The only evidence before us of fabrication was the indirect evidence of the text exchange. Read as a whole, the meaning of the exchange is far from clear. It appears to have been triggered by Mr Moudade complaining to the Claimant earlier in the day that she had made an allegation about him to management. One reading of the exchange is that Mr Moudade was then caught out in an untruth by the Claimant (denying he had produced a statement), and that he was seeking to avoid further conflict with her. There was no evidence at all that, if the statement was not genuine, it was Mr Pascoe who fabricated it. In any event we find, on the balance of probabilities, that Mr Moudade's statement was genuine.

38. For the avoidance of doubt, we deal with an issue raised by the Claimant in relation to a note made by the appeal officer Ms Narayanasamy, in which she wrote that the statement of Mr Moudade was 'deemed to be fraudulent'. Ms Narayanasamy explained in oral evidence that this was not her own finding, rather it was part of her record of the matters relied on by the Claimant as mitigation. There is no record in the notes of the meeting of Ms Narayanasamy saying that she herself believed the statement to be fraudulent, and no reference to this in her outcome letter. On the contrary, she asked the Claimant whether she wanted her to investigate the statement further, and the Claimant said she did not. Had Ms Narayanasamy already concluded that the statement was not genuine, there would have been no need for her to investigate. We find that the phrase 'deemed to be fraudulent' was nothing more than loose language.

The investigatory interview with the Claimant

39. Mr Pascoe conducted an investigation interview with the Claimant on 11 January 2019. At that meeting, the Claimant's trade union representative, Mr Imran Khan, said that she accepted that she appeared to be intoxicated. He explained she had been feeling unwell, had taken a combination of different medications, including an excessive dose of Night Nurse, and it was her reaction to the medication which made her appear intoxicated.

40. The notes record the Claimant saying [*original format retained*]:

> '… looking at the CCTV now I feel shocked and not knowing is that bad, reflecting on this I can see why everyone was saying that is so bad. I do apologise for it and towards my colleagues and what to have gone through.'

The dismissal by Mr Saunders (Issue D)

41. The Claimant attended a disciplinary hearing on 18 January 2019, conducted by Mr Henry Saunders. The Claimant was again accompanied by Mr Imran Khan. The meeting lasted around three and a half hours. At the end of the meeting, the Claimant thanked Mr Saunders for listening to her. He accepted the Claimant's explanation that her intoxication was a result of the medication she had taken. Nonetheless, he did not consider that this was sufficient mitigation: he considered that she was responsible for the state she was in; he concluded that she had brought the company into disrepute by her conduct, which led to her having to be forcibly removed from the store by the police; her behaviour was witnessed by customers and passers-by. He concluded that the appropriate sanction was summary dismissal for gross misconduct.

42. The Claimant alleged that Mr Saunders had a pre-prepared dismissal letter on his desk when she went into the meeting. We find he did not. He left the office during the adjournment, drafted the letter and printed it out, before resuming the hearing and communicating his decision. The reason the Claimant did not know this was because she and her representative had gone elsewhere during the adjournment; they had to be located before the meeting could be resumed.

Ms Narayanasamy then overturning that decision, replacing it with a final written warning (Issue E)

43. On 23 January 2019, the Claimant appealed the decision to dismiss her. The appeal hearing, conducted by Ms Narayanasamy, took place on 6 February 2019.

44. Ms Narayanasamy gave her decision on the day and confirmed it in a letter dated 14 March 2019. She allowed the appeal in part and concluded that the appropriate sanction was a final written warning. In reaching that conclusion she took into account additional mitigating circumstances: she found that the illness of the Claimant's parents had affected her judgement. Ms Narayanasamy recommended that the Claimant be relocated to a different store, so that she could have a fresh start, away from the other managers, of whom the Claimant had been very critical. The Claimant did not disagree with Ms Narayanasamy's recommendation at the time. It was not put to Ms Narayanasamy in cross-examination that the Claimant told her that she wished to stay in the same store because it was close to Homerton hospital, where her mother was receiving treatment at the time. We find she did not do so.

45. Ms Narayanasamy later became aware that the Claimant was unhappy with being asked to move. She spoke to the Claimant to explain again why she had made the recommendation.

46. The Claimant was offered a role in the Bethnal Green store, which she rejected on 19 February 2019; she wished to remain in her current store. She later explained that she did not wish to work with Mr Saunders, the manager who had dismissed her. Ms Sabrina Brenner of HR tried to arrange a meeting with the Claimant to discuss her options, but without success. After further discussions, a transfer to the Gallions Reach store was arranged, which was closer to the Claimant's home than the Hackney store. She began to work there on 15 April 2019. That decision was not taken by Ms Naranasamy; the Claimant, in her witness statement, states that it was taken by a Store Director (first name, Jez; surname not provided).

<u>The Claimant's grievance (Issue G)</u>

47. The Claimant lodged a 52-page grievance, which included concerns about the disciplinary process, the reinstatement and the transfer to another store. She also raised issues in relation to breach of confidentiality and data protection. Many of the factual matters echoed those she raised in these proceedings. There was no suggestion of sex discrimination, however, either in the grievance document or at the grievance hearing.

48. The grievance hearing took place on 24 July 2019 and was conducted by Ms Wright. The Claimant was again accompanied by a trade union representative. At the hearing the Claimant complained about the length of time between her reinstatement and her transfer to another store. Much of the discussion revolved around issues of pay, and the question of whether errors of calculation had been made and, if so, whether they have been corrected. The hearing lasted for some five hours.

49. Miss Wright reviewed the evidence which the Claimant had provided and reached her conclusion, which she communicated to the Claimant on 28 September 2019. She partially upheld two points: she found that the

investigatory and disciplinary processes (as well as other factors unrelated to work) had had an impact on the Claimants mental health; she recommended that the Claimant be referred to occupational health. She also acknowledged that there had been delays in the Claimant receiving her reinstatement pay, and that this had caused her financial hardship; she recorded that the money had now been paid in full to the Claimant.

50. She concluded that it was reasonable to require the Claimant to move to a different store because there had been a breakdown of working relationships in the Hackney store, including on the part of the Claimant, who remained aggrieved about the handling of the January events by Mr Pascoe and others. Other managers had been required to move stores, even if they objected.

The Claimant's comparator

51. In support of her discrimination claims the Claimant compared her treatment with that of a male manager who, on 19 October 2019, went for a meal with other Tesco colleagues, out of working hours, at Tayyab's restaurant in Whitechapel. It was not a work event: it was neither organised, nor paid for, by the Respondent; none of the attendees were wearing uniform. Although the restaurant does not serve alcohol, it permits customers to bring their own, which some of them did. Towards the end of the evening, events occurred which led to the male manager being accused of verbal sexual harassment by a female colleague.

52. That matter was investigated by Mr Saunders. The manager admitted drinking and admitted that he had little recollection of the events in question. Mr Saunders' referred the matter for a disciplinary hearing; a different manager dealt with the disciplinary hearing and issued the manager with a final written warning.

53. We have concluded that the Claimant's account of this incident (at which she was not present), and its aftermath, was exaggerated in certain respects, and unreliable. Contrary to her evidence, there was no allegation of sexual assault against the male manager.

The law to be applied

Time Limits

54. S.123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

55. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).

56. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in

which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

57. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so. That is a very broad discretion. In exercising that discretion, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

58. The fact that the Claimant was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative (Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR 116 at para 16).

59. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 *per* Sedley LJ at [31-32]).

<u>The burden of proof</u>

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 conveniently 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) 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**

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

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 *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.

Harassment related to disability

63. Harassment related to disability is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> > **(a) A engages in unwanted conduct related to a relevant protected 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.**
>
> **…**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> > **(a) the perception of B;**
> > **(b) the other circumstances of the case;**
> > **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
> **…**
> **sex**
> **…**

64. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where

the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

65. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at para 47) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

66. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ (at para 12), referring to the above, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

Direct discrimination because of sex

67. S.13(1) EqA provides:

> **(1) 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.**

68. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] ICR 501, *per* Lord Nicholls at 511). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

69. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan per* Lord Nicholls at 513).

70. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic.

71. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical

comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here sex.

72. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [11-12], Lord Nicholls questioned the need for a two-stage approach, particularly in cases where no actual comparator was identified:

> **'[…] 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 […]'**

73. Since *Shamoon*, the appellate courts have 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, eg, *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.'**

Conclusions

Time limits

74. The parties agreed that any act/omission before 12 April 2019 was out of time, unless it amounted to conduct extending over a period. Only the transfer of the Claimant to a new store and the grievance outcome were in time. We took into account the fact that the decision-makers at each stage were different; they reached their conclusions independently of each other; we also noted that there were significant gaps between those decisions. We regard the outcomes at each stage as distinct acts, rather than conduct extending over a period.

75. However, we consider that it is just and equitable to extend time. Although not a determinative factor, we took into account the fact that the Claimant was seeking to resolve her concerns internally; that process could properly be regarded as concluding only with the grievance outcome. Other than the fact that Mr Khan was no longer employed, Mr Zovidavi did not identify any

significant prejudice to the Respondent, if time were extended. The delay in issuing proceeding did not affect the cogency of Respondent's evidence: its witnesses had no difficulty recalling the events in question. By contrast, the prejudice to the Claimant would very substantial, if time were not extended: she would be deprived of any potential remedy.

Issue A (direct sex discrimination): '[Mr Khan, Ms Eadon and the security guard (Kevin)] treating the Claimant inappropriately [on 2 January 2019] when she was unwell by accusing her of being drunk'

76. There is no doubt that Mr Khan, Ms Eadon and Kevin all told the Claimant they thought she was drunk.

77. To persuade the Claimant to go home, they had to explain to her why that was necessary. Mr Khan had initially refrained from doing so, but the Claimant had refused to leave. All three believed the Claimant was drunk; she did not give the alternative explanation she provided later (the side-effects of medication). Because she continued to refuse, they continued to explain. Insofar as their behaviour was accusatory, it was in response to the Claimant's refusal to leave. We consider that they acted appropriately.

78. Because their treatment was not inappropriate, the claim fails on its facts.

79. In any event, it will be apparent from the previous paragraph that we are able to make positive findings as to the reason why these three colleagues told the Claimant that she was drunk: they said it because they believed it; she smelled of alcohol; her behaviour was consistent with her being drunk; and they thought it imperative that she go home.

80. We are satisfied that, in the same circumstances, they would have told a male employee he was drunk. The Claimant's sex played no part in their conduct.

Issue H (harassment related to sex): 'The harassment alleged by the Claimant is the treatment she received at the Respondent's Hackney store on 2 January 2019, and in particular the manner of her apprehension in the number of staff and police officers involved therein, as well as the fact that all such matters/incidents were filmed or otherwise recorded'

81. The allegation falls into three parts: (1) the manner of the Claimant's apprehension; (2) the number of staff and officers present; and (3) the alleged filming of the incident by Mr Khan.

82. With regard to (3), we have already found as a fact that this did not occur (paras 31-33).

83. As for (1), the Claimant accepted in cross-examination that asking her to leave the store was a reasonable request in the circumstances. Nonetheless, we are satisfied that the conduct was unwanted. She found the manner of her treatment on 2 January 2019 - being asked to leave the shop, being told that she appeared to be drunk, the decision to call the police, and being escorted off the premises - objectionable.

84. We note that in the course of cross-examination, the Claimant was asked whether she alleged that the female police officers' treatment of her was related to her sex; she said no. In any event, the Respondent would not have been liable for their actions.

85. Those involved in dealing with the incident acted as they did for a number of reasons: to ensure that the Claimant left the store; to prevent further inappropriate behaviour by her, involving other staff, and in front of members of the public; and to ensure that she went home, without injuring herself in the process. The extent to which those objectives came to the fore changed at different points, partly in response to the Claimant's behaviour. The Tribunal has no doubt that they were right to seek to persuade the Claimant to go home: she could not remain at work, presenting as she was.

86. None of the conduct was related to the Claimant's sex. Indeed, we consider it likely that a man, presenting in the way the Claimant did on that day, may well have been treated more robustly than the Claimant was treated. Those involved showed restraint and persistence: they spent time talking to the Claimant before they called the police; the police then spent further time trying to persuade her to leave voluntarily before escorting her from the premises.

87. The Claimant focused on the fact that the security guard took hold of her arm twice. We have already made findings as to his purpose in doing so. We are satisfied that the Claimant's sex played no part in his actions; he would have done the same, had he been dealing with a man.

88. As for (2), the reason why a number of people attended was because it was a challenging situation; it required a group effort to manage the Claimant in her state of agitation; each attended in a capacity which was supportive of the Claimant, and of each other. The attendance of the police officers was unrelated to the Claimant's sex: they were called for no other reason than that the Claimant refused to leave; the fact that they were women officers was coincidental.

89. It is right that Ms Eadon was present because Mr Khan thought (and the Respondent's practice was) that there ought to be a woman present. To that extent, her attendance was related to the Claimant's sex.

90. Ms Eadon's presence, and her actions, did not have the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment ('the proscribed environment'). Her purpose was as described above, and was, at all times, supportive and constructive.

91. We do not accept that the Claimant's subjective perception was that Ms Eadon's presence had the effect of creating the proscribed environment. Insofar as it was suggested that it did, we conclude that it was not reasonable for it to have that effect. The Claimant would have known that it was standard practice for a woman to be present at an incident of this sort; Ms Eadon did not behave in an intimidating manner; on the contrary, the CCTV shows her behaving in a supportive manner.

92. For the avoidance of doubt, if we are wrong about the fact the presence of the male colleagues was not related to sex, we have concluded that neither their presence nor their conduct had the purpose of creating the proscribed environment. We have already identified their overall purpose, and specifically the security guard's purpose in taking hold of the Claimant's arm.

93. Nor are we satisfied that it was reasonable for their presence or their conduct to have the effect of creating the proscribed environment. We took into account that the Claimant's subjective perception included the fact that the presence of so many men reminded her of a distressing experience she had previously had. Notwithstanding that, we concluded that her colleagues conducted themselves proportionately and professionally; viewed objectively, they were doing their best to manage a very unusual and challenging situation.

94. Consequently, the claims of harassment related to sex fail, either because the conduct relied on was not related to sex and/or because it did not have the purpose or effect of creating the proscribed environment.

Issue B (direct sex discrimination): [Mr Pascoe] commencing a disciplinary investigation.

95. Issue B was withdrawn. Mr Pascoe had no choice but to commence a disciplinary investigation, given the complaint he received from Ms Eadon on his return to work.

Issue C (direct sex discrimination). [Mr Pascoe] conducting the investigation inappropriately by producing a statement by Hamza Moudade that he had not made, and otherwise inappropriately influencing witnesses to say that the Claimant was drunk.

96. Issue C fails, because we have already found that the conduct alleged did not occur (paras 35-38).

Issue D (direct sex discrimination): [Mr Saunders] initially summarily dismissing the Claimant.

97. The Tribunal was able to reach a positive conclusion as to the reason why Mr Saunders dismissed the Claimant: he did so because of the serious view he took of the Claimant's conduct, in particular the fact that it took place at work, in front of members of the public, and involved her resisting police attempts to remove her from the premises. He considered that her conduct amounted to gross misconduct. We accept his evidence that he would have treated a male employee, in the same circumstances, in the same way. We are satisfied that the Claimant's sex played no part in his decision.

98. We cross-checked that conclusion by applying the burden of proof provisions.

99. The Claimant relied on an actual comparator, the male colleague who was disciplined by way of a warning for verbal sexual harassment, in circumstances where the Claimant contends that he was suffering from the effects of alcohol consumption (paras 51-53). We have concluded that he was not a true comparator. His circumstances were materially different from the Claimant's: his conduct took place at a social event away from the workplace, which had not been organised by the Respondent, at which observers would

not associate the participants with the Respondent; the Claimant's conduct took place at work, shortly after her shift, in circumstances where, for reasons we have already given, she would readily be identified as an employee of the Respondent. Moreover, our focus must be on the mental process of the decision-maker. Mr Saunders was not the decision-maker in the case of the male manager; he was merely the investigator; he plainly took the matter seriously, because he referred it on for disciplinary action.

100. In any event, it is well-established that a difference of treatment and a difference of sex are not in themselves sufficient to raise a *prima facie* case of discrimination. In this instance, the Tribunal specifically asked Mr Shah what he was relying on as the 'something more' which would be sufficient to shift the burden of proof to the Respondent. In response, he relied on the fact that Mr Saunders had not identified alcohol consumption as an issue for consideration in the male manager's case. We were not satisfied that that was sufficient to shift the burden; there was nothing in it to suggest that sex was a material factor in the treatment.

101. For this reason, the burden of proof does not shift to the Respondent. Even if it had, we are satisfied that the Respondent has provided an adequate, non-discriminatory reason for the dismissal: Mr Saunders' genuine belief that the Claimant had committed gross misconduct.

<u>Issue E (direct sex discrimination): [Ms Narayanasamy] then overturning that decision, replacing it with a final written warning</u>

102. When asked in cross-examination, the Claimant did not maintain that Ms Narayanasamy's actions in imposing a final written warning, were sex discrimination. She specifically said that she had asked for a female decision-maker, and commended the way Ms Narayanasamy listened to her case.

103. Nonetheless, the allegation of discrimination was pursued by her representative, both in cross-examination and in closing, and so we deal with it here.

104. By overturning the dismissal and substituting a final written warning, in circumstances where, in our judgment, some form of disciplinary sanction was inevitable, we conclude that Ms Narayanasamy did not subject the Claimant to a detriment. On the contrary, the outcome was favourable to the Claimant.

105. If we are wrong about that, we consider that we are able to make positive findings as to the reason why Ms Narayanasamy imposed a final written warning: she did so because, in her view, the sanction of dismissal was too harsh, having regard to the Claimant's mitigation, much of which she accepted; but she nonetheless considered that the Claimant's conduct was sufficiently blameworthy that it merited a serious sanction.

106. We are satisfied that the Claimant's sex played no part in Ms Narayanasamy's decision.

Issue F (direct sex discrimination): [Ms Narayanasamy] failing to take account of the Claimant's personal circumstances when discussing whether the Claimant could return to work

107. By contrast, the Claimant did allege direct discrimination in relation to Ms Narayanasamy's recommendation that she should be moved to another store.

108. We have already found that the Claimant did not tell Ms Narayanasamy that the reason she did not want to move from the Hackney store was because of her parents' health. For that reason, this claim must fail.

109. In any event, we consider that we are able to make a positive finding as to why Ms Narayanasamy made her recommendation: she believed it would be better for the Claimant to have a fresh start at a different store, taking into account the breakdown in working relationships as a result of the January incident, which included the Claimant's own negative views of her colleagues in Hackney. The Claimant's sex played no part in the decision.

110. We checked our conclusion by considering the burden of proof provisions. The Claimant relied again on the male manager as her comparator. It is right that he was not moved from his store, either in respect of the sexual harassment for which he was disciplined, or for the misuse of alcohol, which the Claimant alleged was a factor his case (but which did not appear to form any part of the disciplinary allegation against him). However, we have already concluded that his conduct occurred in materially different circumstances. Moreover, other than the Claimant's account, which we considered was unreliable (para 56), there was no evidence of a breakdown in his working relations with colleagues. Finally, the decision taken about the male manager was not a decision of Ms Narayanasamy, and it is her mental processes on which we must focus.

111. We are not satisfied that the Claimant has proved facts from which we could reasonably conclude that Ms Narayanasamy acted as she did, in part at least, because of the Claimant sex.

Issue G (direct sex discrimination): [Ms Wright] rejecting the Claimant's grievance

112. When the Claimant was asked directly in cross-examination whether she was alleging that Miss Wright's decision was an act of sex discrimination, she at first appeared confused, and then said that she 'could not comment on that'. Mr Shah cross-examined Ms Wright relatively briefly. He identified a number of points, in relation to which he suggested she could have made further enquiries. To the extent that he pursued an allegation of sex discrimination at all, it was put formally (indeed formulaically), in a single question at the end of cross-examination.

113. We are satisfied that Ms Wright approached the grievance in a fair and balanced manner. Where she rejected parts of the grievance, she provided cogent reasons for doing so. We found her evidence at the hearing measured and credible. We heard no evidence from which we could reasonably conclude

that her decisions were influenced by the Claimant's sex. The Claimant having failed to raise a *prima facie* case of discrimination, that claim is dismissed.

Employment Judge Massarella

15 July 2021

ANNEX: AGREED LIST OF ISSUES

1. The complaints to be determined by the Tribunal are identified as

113.1. direct sex discrimination, in breach of section 13 Equality Act 2010:

A. '[Mr Khan, Ms Eadon and Kevin, the security guard] treating the Claimant inappropriately when she was unwell by accusing her of being drunk.

B. [Mr Pascoe] commencing a disciplinary investigation.

C. [Mr Pascoe] conducting the investigation inappropriately by producing a statement by Hamza Moudade that he had not made, and otherwise inappropriately influencing witnesses to say that the Claimant was drunk.

D. [Mr Saunders] initially summarily dismissing the Claimant.

E. [Ms Narayanasamy] then overturning that decision, replacing it with a final written warning.

F. [Ms Narayanasamy] failing to take account of the Claimant's personal circumstances when discussing whether the Claimant could return to work.

G. [Ms Wright] rejecting the Claimant's grievance.'

113.2. Harassment related to the Claimant's sex, in breach of section 26 Equality Act 2010.

H. 'The harassment alleged by the Claimant is the treatment she received at the Respondent's Hackney store on 2 January 2019, and in particular the manner of her apprehension in the number of staff and police officers involved therein, as well as the fact that all such matters/incidents were filmed or otherwise recorded.'

2. The issues to be determined by the Tribunal at the full merits hearing are agreed and identified as follows:

113.3. Was the Claimant's claim of direct discrimination submitted more than three months after the conduct complained of? The Claimant's claim was presented on 10 September 2019. The last alleged act of discrimination is the Respondent's partial rejection of the Claimant's

grievance on 28 September 2019. The Respondent contends that at least some of the alleged acts of discrimination relied upon by the Claimant at paragraph 25 of her amended particulars of claim are out of time in any event.

113.4. If so, would it be just and equitable for the Tribunal to extend time and hear the claim?

113.5. The Claimant will rely on both a hypothetical and an actual comparator (namely Mr Shamin Ahmed) for the purposes of her direct discrimination complaint.

113.6. Was the Claimant treated less favourably than a comparator was or would have been? The alleged acts of discrimination are those set out in paragraph 25 of the Claimant's amended ET1 particulars of claim.

113.7. If so, was the reason for such treatment the Claimant's sex?

113.8. Is the Claimant's harassment complaint out of time? If so, would it be just and equitable for the Tribunal to extend time and hear the claim?

113.9. The harassment alleged by the Claimant is the treatment she received at the Respondent's Hackney store on 2 January 2019, and in particular the manner of her apprehension and the number of staff and police officers involved therein, as well as the fact that all such matters/incidents were filmed or otherwise recorded.

113.10. Did such unwanted conduct relate to the Claimant's sex; and if so, did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or, offensive environment for her?