EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
MS E HALL		**(1) VICTORIA & ALBERT MUSEUM** **(2) GERARD AHEARN**

Heard at: London Central, by CVP

On: 4 to 8 October, 2021

Before: Employment Judge O Segal QC
Members: Ms Brazier; Mr M Reuby

Representations
For the Claimant: Mr P Tomison, counsel
For First Respondent: Mr A Shellum, counsel
For Second Respondent: Mr Baiden, legal advisor

JUDGMENT

The unanimous judgment of the Tribunal is that the claims of discrimination and harassment are dismissed against both Respondents.

REASONS

1. The Claimant brings claims of direct discrimination because of her sex, alternatively harassment relating to her sex/sexual harassment, during part of her period of employment with the First Respondent as a Gallery Assistant.

Evidence

2. We had an agreed bundle prepared pursuant to the directions of the tribunal. We also had, by consent of the parties, three voicemail files ('the Voicemails') and some video clips of a TV programme 'In the Thick of It'. We had witness statements and heard live oral evidence from:

For the Claimant

2.1.the Claimant (C);

2.2.Lois Austin, a full-time PCS officer and C's representative during her grievance;

For the First Respondent (R1):

2.3.Vincenza Rubini (VRub), Visitor Experience Manager at the material time;

2.4.Victoria Rosolia (VRos), Senior HR Business Partner at the material time;

2.5.Judy Roberts (JR), Head of HR at the material time;

2.6.Adam Pentelow (AP), Head of Finance;

2.7.Lois Honeywill (LH), Deputy Head of Visitor Experience at the material time;

2.8.Jonathan Curzon (JC), Retail and Catering Operations Manager;

For the Second Respondent

2.9.the Second Respondent (GA).

3. In general, although we did not accept all evidence given to us as reliable, we believed that the witnesses were doing their best to give honest evidence to the tribunal. However, for the reasons set out below, we found that C was less careful in

her recollections and less willing to concede that they were or might be inaccurate than was GA. Thus, where their evidence differed and where there was no determinative corroborative evidence, we were inclined to place more reliance on GA's evidence.

Facts

4. We set out below only the relevant facts. Most of the material facts were contained in documents or the voicemails. However, there were a few areas of disputed fact. We identify those where material.

5. C and GA were both Gallery Assistants; GA from January 2009, C from October 2017.

6. GA was also a lay union representative of PCS until about April 2019. C joined as a lay union representative in about March 2019. The two attended some two union meetings together.

7. There are well over a hundred people employed by R1 in that role at any time. Their main job is to be present during opening hours of the museum to attend to public queries or concerns and to monitor public behaviour in relation to the exhibits in the galleries.

8. Each Gallery Assistant whilst on duty effectively works alone, although there might be infrequent contact with a neighbouring Gallery Assistant if required. They might meet if on the same shift when preparing for work, at the morning briefing, when at lunch etc; but days or weeks might go by without a Gallery Assistant meeting any other particular Gallery Assistant.

9. R1 takes various measures to ensure that its staff are aware of issues of equality and diversity, including harassment. We set out those material in the present context.

    9.1. There is a lengthy and detailed Bullying and Harassment Policy, which is provided to all staff (originally in hard copy, now on an intranet), which includes sections on what constitutes sexual harassment and on how to raise concerns or complaints about harassment. There is also an Equality, Diversity and Inclusion Policy.

9.2. There is an induction process for new staff, which includes elements on equality and diversity and, latterly, on how to access key policies through the intranet.

9.3. In 2016, at an extended weekly briefing, attended by GA, LH spoke to Gallery Assistants about sexual harassment, using slides which explained what that was.

9.4. In 2017, the team had training on equality and access.

9.5. In November 2017, a director of R1 issued a communication to all staff, reminding them that the V&A had policies and procedures in place to be utilized, should anyone wish to raise any issues in confidence

9.6. In 2018 and 2019, in the context of Performance Reviews, R1 provided training on inter alia personal behaviours.

9.7. In 2018 the Suzy Lamplugh Trust delivered training on personal safety in the context of sexual harassment.

9.8. Between 2017 and 2020 R1 reviewed and constructed a set of employee behaviours, starting with an externally managed staff survey, taking initial actions, conducting a follow-up survey, then using staff focus groups.

10. C and GA did not get to know each other after C joined for some time. They met on a social occasion with another person. Then GA represented C as her PCS rep in a disciplinary matter which began in November 2018 and concluded at a hearing in January 2019.

11. Also in January 2019 C joined GA as a team of two dealing with Insect Pest Management. This meant that for some half a day every 3 months, they were to work closely together, although by reason of subsequent events that only happened once.

12. From April 2019 GA changed his hours from full-time to part-time. Thereafter, the two might be working the same shift about once a week, sometimes more.

13. By April 2019 it is common ground that C and GA had developed a friendly relationship in which C in particular exchanged humorous put-downs in texts/WhatsApp messages. Around April 2019, GA realised he had romantic feelings towards C.

14. On 28 April 2019 GA was due to meet an ex-employee of R1, Hannah LeGood (HL) after work. HL, who was a friend of both C and GA, but closer to C, had also invited C, although GA's understanding as he left work was that C was not planning to join them. In fact, C and GA met by chance at the station near work, both on their way to meet HL at a pub some distance away near where HL worked.

15. GA had had a difficult day at work; and C was not best pleased at having to travel to a pub near HL's work. Neither was in the best mood on the train journey. C gave evidence that GA was shouting at her. GA gave evidence that C was criticising him for agreeing to meet at the pub they were going to and that by the time they got off the train he tried to put a little distance between them, even crossing the road through traffic. Once at the pub, C declined a drink and left fairly quickly; GA and HL stayed for some time.

16. The next day GA sent HL a text apologising for complaining and ranting (presumably when speaking to HL after C had left the pub) saying he had been upset and that C had a way of making him feel small. On 30 April, GA texted HL that C had been criticising the choice of pub on the journey and that had caused a frosty atmosphere. A few days later, C referred to herself in a text to GA as having been 'tired' after a 'hard time that day' to explain why she had been quiet and left the pub early.

17. In terms of liability, it does not in the end matter, but we find that GA' account of the journey to be, on balance, more reliable. It is more consistent with the texts which followed, GA's evidence in cross-examination was more cogent, and, as stated above, GA's evidence as a whole appeared more reliable. In all events, we find that nothing said by GA to C during the train journey on 28 April was related to her sex within the meaning of s. 26 EqA.

18. It appears from other texts between GA and HL on 30 April that he spoke to her about his feelings for C, and that HL and C had themselves spoken about this to some extent.

19. In so far as GA and C were on the same shifts between 29 April and 4 May, GA kept out of C's way. On 4 May, having completed her shift and on her way out of the building C texted GA "You ignoring me?". This led to an exchange of texts over that and the next day in which C rightly understood that GA had romantic feelings

towards her. The relevant texts were exchanged late at night and C responded in generous and kind terms: *I don't and can't reciprocate. I value you, and your friendship, … I enjoy our time together … I really don't want this to affect our friendship … I do love and care about you, even if it is not the way you wish. … I will be in Canada for 2 weeks from Monday [6 May]. But you can contact me speak to me in person before or after I go.*

20. GA responded that he realised he had been behaving oddly around C, that he did not want to be a nuisance or a bother to her. C responded that GA could never be a nuisance, ending that text *Im going to give you some space while I'm away but don't hesitate if you want to talk to me.* In later texts on 5 May GA asked C to send her a photo of the CN Tower in Toronto.

21. On 9 May C sent GA a photo of the CN Tower. GA responded *Do they still have those glass panels beneath your feet? Ooh Er!* We find that there was, objectively, no sexual innuendo in that text, although we accept that C was not sure whether that was the case.

22. There was no further communication between them whilst C was in Canada – although one of the claims in this case is that GA messaged C whilst in Canada over the period of her two week holiday, including inappropriate texts and WhatsApp messages (which claim is not supported by the contemporaneous evidence).

23. On C's return there was an exchange of texts very much in keeping with the banter between the two before 28 April. Then on 25 and 26 May GA sent two short texts saying how much he admired C. There was no sexual content, but C felt uncomfortable. She replied after a little time *Sorry for not replying straight away, didn't really know what to reply to that haha. Please stop complimenting me! See you soon*.

24. GA, in texts sent over the following days, reverted to the fact of his feelings for C (though not in the sense of pressing for reciprocation) and paid her an extravagant if partly humorous series of compliments to which C did not reply.

25. A few days later on 4 June, C sent GA a text *Just to let you know I did bugs yesterday! No hiccups, other than one moved trap! Not quite the same though*

[concluding with a 'thumbs up' emoji]. GA replied inter alia *Did you have to get down and dirty to retrieve the errant trap?*. C interpreted this question as sexual innuendo. Objectively, we disagree. In the context of scrabbling about on the floor to retrieve an insect trap which had been moved, the phrase 'down and dirty' seems to us rather more literally deployed, though there may have been a jokey overtone.

26. In her next text C referred to someone involved in making a TV documentary at R1 wanting to get C involved. GA replied *I think you would have looked great on screen*. This seems to us an implicit reference to C's appearance and to that extent related to her sex.

27. On 17 June GA sent one further text to C, paying her compliments – which again made C feel uncomfortable and to which she did not reply.

28. We make it clear that, as is evident from the screen-shots in the bundle, all the texts we have referred to sent by GA were sent well outside of work hours and not from work premises.

29. On 18 June, GA, who suffered from a history of depression, felt very low and began drinking significant amounts of alcohol. His mood worsened and at one point he phoned the Samaritans. During the evening he phoned C's mobile, but went through to voicemail. Mainly because of his drunken state and partly because of his unfamiliarity with using his smartphone to make calls, GA unsuccessfully attempted to ring off, but in fact ended up leaving a voicemail of several minutes, during which he can be heard swearing, there are silences, then more swearing, sometimes obviously at some distance from his phone.

30. Some time later, GA realised that he remained connected and ended up re-dialling by accident, leaving another similar though much shorter voicemail.

31. Later again, GA redialled – he was by now so drunk he cannot remember doing so at all – and left another message of a few minutes duration, again including shouting, swearing and long silences.

32. We find that GA did not intend to leave voicemail messages as such and that the foul language recorded was not directed to C.

33. Unsurprisingly, however, this was not obvious to C and she was alarmed and distressed by these messages.

34. C gave evidence that there was a fourth call and voicemail, in which GA could be heard saying something to the effect, he knew where C lived. We find that this did not happen. GA's phone records, and the audio files of the three calls recorded which correspond with those records, make that clear. Also, it seems that GA did not know where C lived. In any event, it would have been out of character for GA to make such a veiled threat to C. It may be that C in her alarm thought she had heard something like that and has not been persuaded subsequently to withdraw that allegation in the face of the evidence.

35. C reported the texts and voicemails to VRub and LH on 21 June. GA was immediately suspended and escorted from the building. In fact, by reason of ill health, GA never returned to work at R1 in the material period (and was thereafter, like C, dismissed as redundant).

36. C later provided R1 with many of the texts we have referred to, though having deleted some of her own (out of embarrassment, she told us), which somewhat altered the overall context, together with the three voicemails. C also attended an investigatory meeting on 16 July, at which she explained how she had felt since 28 April by reference to the texts, etc, and how the voicemail had affected her. She also said that GA had been complaining about C having a relationship with a friend of theirs at work Jon Cowling, though a later statement provided by Mr Cowling did not corroborate that and GA denies it.

37. A disciplinary process was undertaken into GA's conduct, during which R1 obtained an OH Report on GA which concluded that GA had been suffering from severe anxiety and/or depression for many years, treated at times by medication. R1 inferred that GA was probably disabled within the meaning of the EqA.

38. Following a disciplinary hearing in respect of which the 'charges' related solely to the voicemails, with the texts being referred to as relevant context, R1 gave GA a final written warning by letter dated 13 August 2019, which also instructed GA not to make any further contact with C and that if and when he was fit to return to work the

'operational impact' of that requirement to avoid contact with C would need to be discussed.

39. On 23 August GA texted HL asking *Are we still friends?* In the following exchanges (ending 28/8/19), GA told HL that he was full of guilt and remorse, but had been told not to contact C. HL asked him what R1 had done and he told her about the final written warning and that he remained signed off sick from work. In a subsequent text, he wrote *I just wish I could explain to her what happened that day and how truly sorry I am and ask her to forgive me ….* HL replied *Well I'll let her know this … I don't think it's a good idea to contact her again but I'll let her know what you said*.

40. We find as a fact that GA was not attempting to contact C indirectly by these texts to HL. Rather, he was clear that he must not be in contact with C; and it was HL who, no doubt in what she perceived to be the best interests of C, decided (as she had indicated to GA) to let C know that GA was full or remorse, etc. In all events, C discovered from R1 that GA wanted to write a letter of apology to her, which she declined.

41. On 29 August, R1 wrote to GA, saying that his texts to HL apparently constituted a breach of the condition imposed in the final written warning letter not to contact C, on the basis that he knew the information he gave HL would be shared with C. That disciplinary process was stayed to allow a further referral of GA to OH.

42. Meanwhile, on 28 August 2019 VRos met with C and LA to tell C that the (first) disciplinary process into GA had concluded. She told C that GA was still off work sick with no set date to return, but that before he did return to work measures would be explored and discussed with C to reduce or eliminate the risk of any contact between them. The precise way in which that might work was not explored at this meeting. It was at that meeting that C said that she did not want GA to write a letter of apology to her when VRos raised that.

43. On 27 September 2019, C put in a grievance that, materially: she had been subject to sexual harassment by GA; and that the appropriate measures had not been put into place to ensure that GA would not return to work in the same building as her.

44. LH dealt with this grievance and held a meeting with C and LA on 14 November 2019 (the delay was largely to accommodate LA's pre-booked annual leave). At that meeting the position of C and LA was that the only acceptable outcome as regards GA was that he should either be dismissed or return to work at another site. R1 has two other sites, though at neither does it employ Gallery Assistants; at one, the Museum of Childhood, a role including similar responsibilities together with security responsibilities exists but is provided by a contractor. LA told LH that C had prepared to present a tribunal claim if required.

45. LH did not guarantee the outcome C sought. As to what would happen if GA returned to work at the V&A, LH made it clear that measures would be put in place to ensure that C and GA did not have to come into contact; however, she did not tell C (though she mistakenly recalls having done so) that R1 would ensure that C and GA were never rostered to work the same shift (something that, much later, R1 did commit to). The full minutes and subsequent letter of 19 November 2019 to C confirm that position, which included specific potential operational measures to be put into place if GA returned to work.

46. The OH referral of GA resulted in a report in October 2019, which was followed up with a further referral and further report in December 2019.

47. The ET1 in this case was presented on 13 December 2019.

48. We deal with subsequent events shortly:-

    48.1. GA remained on long-term sick and for a time on a 'career break' and the second disciplinary process only concluded in August 2020, with R1 extending the final written warning by a further 12 months.

    48.2. Both C and GA were made redundant in early 2021.

The Law

49. As to the claims of direct discrimination, s. 13 EqA 2010 (the Act) provides that

    (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.

50. Section 136 of the Act provides, as to the burden of proof, that

(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.

51. Although the two-stage analysis of whether there was less favourable treatment followed by the reason for the treatment can be helpful, as Lord Nicholls explained in Shamoon at [8], there is essentially a single question: *"did the claimant, on the proscribed ground, receive less favourable treatment than others?"*

52. The Tribunal is required in many cases, as in this, to consider how a hypothetical comparator would have been treated. In answering that question, the treatment of non-identical comparators in similar situations can assist in constructing a picture of how a hypothetical comparator would have been treated: Chief Constable of West Yorkshire v Vento (No. 1) (EAT/52/00) at [7].

53. A claimant does not have to show that the protected characteristic was the sole reason for the decision; *"if racial grounds or protected acts had a significant influence on the outcome, discrimination is made out"*: Nagarajan v London Regional Transport [2000] 1 AC 501 at pp512-513. The discriminator may have acted consciously or subconsciously: Nagarajan at p522.

54. We refer to well-known remarks of Mummery LJ in Madarassy v Nomura International Plc [2007] ICR 867, [56-58] on the burden of proof issue, albeit in the context of a claim that the claimant had been treated less favourably than actual comparators: that for stage 1 of the burden of proof provisions to be met, what is required is that *"a reasonable tribunal could properly conclude"* from all the evidence, that discrimination occurred.

55. As to harassment, s. 26 of the Act provides:

(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.

(2) A also harasses B if—

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

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

...

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

(a) the perception of B;

(b) the other circumstances of the case;

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

56. As to the 'objective' element of the test, the EAT in Reed and another v Stedman [1999] IRLR 299 at [28] observed in relation to similar statutory provisions:

Because it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what a tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed. ... the fact-finding tribunal should not carve up the case into a series of specific incidents and try and measure the harm or detriment in relation to each". The tribunal

must keep in mind that *"each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes."*

57. The *"related to"* test is broader than the *"because of"* test in s. 13. However, ss Underhill LJ explained in Unite the Union v Nailard [2018] IRLR 730 at [108]-[109], the tribunal is required to make findings as the motivations and thought processes of the individual decision-makers as to whether their actions were 'related to' the protected characteristic.

58. On the question of the liability of an employer, it may, as here, be important to identify whether conduct of an employee complained of was done in the course of employment.

59. Section 109 EqA states, as far as relevant:

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

…

(3) It does not matter whether that thing is done with the employer's … knowledge or approval.

60. The words "*in the course of A's employment"* are not to be interpreted by reference to the common law test for vicarious liability in tort: Jones v Tower Boot Co Ltd [1997] ICR 254 at p265. The application is of the phrase is a question of fact for the tribunal to decide, as laypersons might, in light of the circumstances presented to it: Jones at p254.

61. Incidents outside the employer's premises and while the employees are off duty, including at social gatherings of colleagues, are capable of being *"in the course of A's employment"* and it is appropriate for a tribunal to consider whether or not the circumstances show that what was occurring was an *"extension of their employment":* Chief Constable of Lincolnshire Police v Stubbs [1999] ICR 547 at p558.

62. In HM Prison Service and ors v Davis UKEAT/1294/98, the claimant, a prison officer at Cardiff Prison, alleged that she had received an unexpected visit at home one evening from a colleague who then made unwanted sexual advances towards her. The EAT described the Tribunal's decision, in which the respondent had been held vicariously liable, as *'bereft of any reason'* [22] and that the following factors relied upon as imposing vicarious liability were not *'of any real and material gravity'*:

    62.1. The fact that the harassing employee's contract stated that his conduct *'on and off'* duty must not bring discredit to the Prison Service. The EAT held that *'the fact that an employer can complain of activity outside employment does not make that activity inside the course of employment'* [13].

    62.2. The fact that, once the claimant complained of the harassing employee's conduct, the respondent ensured that shifts were organised to minimise the possibility of the parties meeting. The EAT, in giving *'no weight'* to that factor, held that an employer's actions after certain impugned conduct has happened cannot be relevant to the question of whether a harassing employee was acting in the course of their employment at the time [14]; and

    62.3. The fact that the respondent took immediate action in response to the claimant's complaint, including instigating disciplinary proceedings. The EAT held that this factor was *'devoid of any weight'* [17]. The fact that the respondents displayed concern over an incident distressing to their employee could not affect whether that incident was within the course of employment.

63. The EAT in Davis had regard to the following factors in finding that the Tribunal had erred in law, that the case had *'the very most slender of connections with work'*, and that the respondent was not vicariously liable [19]:

    63.1. The harassing employee was not on duty at the relevant time; the pointers, such as that he was apparently visiting socially, and that he had been out for a drink himself and that he invited the claimant out for a drink all pointed to him having been off duty;

63.2. The harassing employee and the claimant had not been on the employer's premises but at a pub and at the claimant's premises and the occasion began socially; and

63.3. The harassing employee's visit seemed to have taken advantage of no particular connection with work, save only that it seemed he and the claimant must have met at work.

64. Finally, an employer can rely on the defence at section 109(4) EqA which is in the following terms:

> *(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—*
>
> *(a) from doing that thing, or*
>
> *(b) from doing anything of that description.*

65. This defence is not available to employees liable under section 110 EqA.

66. The EHRC Employment Code provides the following example:

> *An employer ensures that all their workers are aware of their policy on harassment, and that harassment of workers related to any of the protected characteristics is unacceptable and will lead to disciplinary action. They also ensure that managers receive training in applying this policy. Following implementation of the policy, an employee makes anti-Semitic comments to a Jewish colleague, who is humiliated and offended by the comments. The employer then takes disciplinary action against the employee. In these circumstances the employer may avoid liability because their actions are likely to show that they took all reasonable steps to prevent the unlawful act.* [para 10.50]

67. The burden of establishing the s.109(4) EqA defence rests on the employer. What amounts to 'all reasonable steps' will depend on the facts of the case. The EHRC Employment Code suggests the following [para 10.52]:

67.1. Implementing an equality policy;

67.2. Ensuring that employees are aware of the policy;

67.3. Providing equal opportunities training;

67.4. Reviewing the policy as appropriate; and

67.5. Dealing effectively with employee complaints.

68. The proper approach of a tribunal to this defence was explored in Canniffe v East Riding of Yorkshire Council (17 April 2000) UKEAT/1035/98 at [14]:

68.1. To identify whether the Respondent took any steps at all to prevent the employee, for where it is vicariously liable, from doing the act or acts complained of in the course of his employment;

68.2. Having identified what steps, if any, they took to consider whether there were any further acts, that they could have taken, which were could reasonably have taken.

68.3. Whether the doing of any such acts would in fact have been successful in preventing the acts of discrimination in question may be worth addressing, and may be interesting to address, but is not determinative either way.

69. If the employer is relying upon training, the tribunal should consider the nature of the training, the extent to which it was likely to be effective and whether it had become stale: Allay (UK) Ltd v Gehlen [2021] ICR 645 at [37] and [46]-[47].

Discussion

70. All parties provided written submissions and Mr Tomison and Mr Shellum supplemented those orally. We do not set out those submissions in detail here, but will refer to them as necessary. We are grateful, in particular to both counsel, for their helpful written and oral submissions.

71. We turn to the specific claims, set out in a List of Issues approved by the tribunal at a PH, which none of the parties suggested during the hearing needed to be substantively amended.

72. Although all the following allegations were put in the alternative as either acts of discrimination or of harassment, Mr Tomison sensibly addressed those involving GA as primarily allegations of harassment and those involving only R1 as primarily acts of discrimination.

Allegation a. - 28 April 2019: the Second Respondent becoming verbally abusive and angry with her, while travelling to have drinks with Hannah Le Good

73. We refer to our findings of fact, which do not support this allegation.

74. Further, given that C and GA were, separately, on their way to meet someone who was not at that time a work colleague, in a purely social environment, not in work time, we would have found that the conduct alleged was not done in the course of GA's employment.

75. Finally, it is not clear to us that had the conduct complained of taken place, it would have been 'related to' (let alone 'because of') C's sex; although it is difficult to be certain about that aspect given our finding that the complained of conduct did not occur.

Allegation b. – 6-20 May 2019: the Second Respondent messaging the Claimant whilst she was in Canada, including inappropriate messages

76. We refer to our findings of fact. Only one message was sent by GA in this period, in response to C's sending him a photo. That message was not, objectively, related to C's sex.

77. Nor was the message unwanted (if not related to her sex): C had twice texted GA to say that he could 'talk to' her whilst she was away – that must include texting.

Allegation c. – 21 May – 5 June 2019: the Second Respondent continuing to text and send compliments to the Claimant, even though she had requested that he stop, and he had acknowledged how uncomfortable it made the Claimant feel

Allegation d. – 17 June 2019: the Second Respondent resumed sending the Claimant unwanted messages

78. We consider that some of the texts GA sent in this period did constitute harassment, albeit of a not very serious sort.

79. The repetitive and extravagant compliments sent to C after she had indicated that such compliments made her feel uncomfortable, including the one sent on 17 June 2019, as well as the text sent on 5 June 2019 telling her she would have looked good on screen, were unwanted.

80. Given the broad test of *"related to"* within the meaning of s. 26, we hold that those texts constituted conduct related to C's sex. They made C feel uncomfortable and we find that, at least collectively, they probably had the effect of creating an offensive environment for her.

81. In respect of those texts, we must therefore address the question whether they were sent during the course of GA's employment.

82. We find that they were not, for the following reasons:-

    82.1. They were sent from R2's personal phone to C's personal phone outside of his working hours.

    82.2. They were personal in nature: expressions of romantic interest and the sending of compliments.

    82.3. They were not to do with work: as C accepted in evidence, *"They're not related to work other than we both work in the same place"*. Nor do they reference work-related matters, other than the text sent on 5 June 2019 telling C she would have looked good on screen, which tangentially referenced a documentary which would have been made at work. In summary, the texts had no, or (to quote the Davis case) only *"the very most slender of connections with work"*.

    82.4. One way in which we 'tested' this issue was to ask ourselves whether the texts would have been any different had GA no longer been working at R1; we concluded that they would not have been.

Allegation e. – 18 June 2019: the Second Respondent calling the Claimant 4 times and leaving voicemail messages, which included white noise, shouting, swearing, laughing and crying, as well as stating that he knew where the Claimant lived

83. We refer to our findings of fact in relation to the last part of this allegation, which did not occur.

84. As to the s. 26 issues, the only question is whether the voicemails were related to C's sex. That they were unwanted and created an offensive and intimidating environment is obvious.

85. We have found that the voicemails were unintentional, but the calls themselves were at least in one instance intentional and GA accepted in evidence that he would not have called C if he had not felt as he did towards her. C was not GA's only or best friend (they had never met up socially just the two of them) and it is difficult to believe (and GA did not state) that GA's choice in his depressed and drunken state to call C was not related to her sex. That being so, it would be somewhat artificial to hold that the calls were related to C's sex but the voicemails were not.

86. The fact that the voicemails were unintended and that C might, at least on reflection, have realised that fact, mitigates the lasting effect of them, but cannot alter the reason for the calls.

87. Again then, the question must be addressed whether the calls/voicemails were made in the course of GA's employment. For the reasons set out in paragraph 82 above we are clear that they were not.

Allegation f. – Around 28 August 2019: the Claimant was advised that the Second Respondent had contacted Hannah Le Good to say that he wanted to meet with the Claimant to explain his behaviour and ask her to forgive him

88. We refer to our findings of fact. This allegation is not made out. C did not contact HL to say he wanted to meet and speak to C. He contacted HL to re-establish friendly communications with HL, and said to her only that he wished he were able to explain himself to C.

89. Nor do we accept, as Mr Tomison submitted and as R1 in effect found in concluding the second disciplinary process involving GA, that by not expressly telling HL not to relay any of their text conversation to C, he was implicitly asking that she do so. It was for HL as C's friend to exercise her judgement as to whether and what to relay to C.

90. In any event, we would not have held that:

    90.1. Such an implicit contact would have created an offensive, etc, environment for C; or that

    90.2. The text conversation between GA and HL was in the course of GA's employment – it evidently was not.

Allegation g. – 28 August 2019: Victoria Rosolia (First Respondent's HR Business Partner) advising the Claimant that the Second Respondent would be returning to work in the same building as her

91. This allegation is made out, though is a rather concise and somewhat misleading summary of what VRos told C on that occasion, omitting as it does that:

    91.1. It was not said that GA would definitely be returning to the same building; and

    91.2. It was said that measures would be put in place to avoid CA and GA coming into contact if he did, and that there would be a full discussion between R1 and C before the event.

92. It was common ground that this allegation in effect contains two complaints:

    92.1. The decision not to dismiss GA and thus to allow him to return to work when he was fit to do so; and

    92.2. The way in which R1 addressed that potential return to work at the meeting.

The decision not to dismiss

93. As to the decision not to dismiss GA, Mr Curzon, whose decision it was to give him a final written warning, gave the following evidence which we accepted as true:-

    93.1. He considered the voicemails were a serious and distressing matter for C. He did not believe that the texts, which had been exchanged sometimes at the instigation of GA and at other times at the instigation of C, justified disciplinary action per se, but that they were material background.

    93.2. It was relevant that GA was not mentally well, as confirmed by the OH report, and had been attempting to self-medicate a depressive episode that evening by consuming alcohol.

    93.3. It was relevant that GA had not intended to leave the voicemails and was very remorseful about distressing C unintentionally.

94. C criticises the decision to administer only a final written warning in particular on the grounds that:

    94.1. It was wrong not to include some of the texts as part of the disciplinary 'charges'; and

    94.2. It was wrong to characterise GA's conduct as 'serious misconduct', rather than 'gross misconduct' – the latter being the appropriate label within the terms of R1's Disciplinary Policy.

95. We accept those criticisms as far as they go. But we do not believe that they go very far. JC did take the texts into account and made findings about them. And however he chose to label GA's conduct, the substance of his decision is that it was not an appropriate sanction to dismiss GA in all the circumstances which he took into account – a decision which C accepted was permissible under the Policy even if gross misconduct is found.

96. Although a different employer might have fairly dismissed GA, the members of this tribunal would not have done so; and it is therefore, in our view, not unreasonable for R1 not to have done so. We ask ourselves in passing in this context how we would have viewed a claim pursuant to ss. 15, 20 EqA by GA had he been dismissed – we think it very arguable that rather than dismiss GA for conduct arising in part from

what is likely a disability, R1 was obliged to make the reasonable adjustment of giving a final written warning and ensuring that C did not have to come into contact with him at work.

97. In any event, the central question, as Mr Tomison accepted, is whether R would have acted any differently had C been a man subject to the unwanted homosexual attentions of someone in GA's position. There is no basis for so thinking; to adopt the language of Madarassy, *"no reasonable tribunal could properly conclude"* that was the case.

98. We do not accept that in this regard the burden of proof shifted to R1; but even had we done so, we accepted JC's evidence that he took C's concerns seriously and made his decision not to dismiss uninfluenced in any way because C was a woman.

The way in which R1 addressed GA's potential return to work at the meeting

99. The meeting on 28 August 2019 was the first discussion C had with the V&A about GA potentially returning to work at some point in the future. At that juncture, R1's approach was not unreasonable – although it might perhaps have given C a clearer assurance than it did, along the lines eventually provided in August 2020.

100. Again, the central question is whether R would have acted any differently had C been a man subject to the unwanted homosexual attentions of someone in GA's position. Again, there is no basis for so thinking; and *"no reasonable tribunal could properly conclude"* that was the case.

101. We do not accept that in this regard the burden of proof shifted to R1; but even had we done so, we accepted VRos' evidence that she took C's concerns with great seriousness and addressed the potential return of GA to work in the way she did by reference to those concerns and not in any way because C was a woman.

102. For completeness, although this was not pressed very hard by Mr Tomison, we find that the actions complained of by R1 under this heading did not constitute harassment of C.

102.1. First, they did not create an offensive, etc, environment for her.

102.2. Secondly, the motivations of the decision makers were not influenced by C's sex: see Nailard (above).

Allegation h. – 14 November 2019: Lois Honeywill advising the Claimant at her grievance hearing that the First Respondent had not decided whether the Second Respondent would be returning to work in the same building as the Claimant.

103. The allegation is made out on the facts; although again it omits some of the relevant context: that C was reassured that GA would not return to work without discussions having taken place with her first; and that the actual measures explored at the meeting and in the grievance outcome designed to prevent contact work between C and GA were tabled as possibly effective but that no decision had yet been made.

104. We accept LH's evidence that similar measures had been put in place in at least one other case and that they had worked effectively.

105. We feel that R1 could have been more forthcoming about the reasons for the delay in dealing with the second disciplinary case against GA. Its explanation was that it did not feel it could discuss GA's health issues with C. However, my lay members and I consider that there was was nothing to prevent R1 informing C that GA remained off sick and that it had been decided not to conclude the disciplinary process until further information had been obtained in connection with his ill health.

106. We accept LH's evidence that redeployment of GA to another site was considered, but would have been difficult if not impracticable given that there were no Visitor Experience roles at the Museum of Childhood, which was also due to be closed for refurbishment, or at the only other site Blythe House.

107. Again, however, the central question is whether R would have acted any differently had C been a man subject to the unwanted homosexual attentions of someone in GA's position. Again, there is no basis for so thinking; and *"no reasonable tribunal could properly conclude"* that was the case.

108. We do not accept that in this regard the burden of proof shifted to R1; but even had we done so, we accepted LH's evidence that she took C's concerns with great

seriousness and addressed the potential return of GA to work in the way she did by reference to those concerns and not in any way because C was a woman.

109. For completeness, we find that again that the actions complained of by R1 under this heading did not constitute harassment of C.

109.1. First, they did not create an offensive, etc, environment for her.

109.2. Secondly, the motivation of LH was not influenced by C's sex.

The s. 109(4) defence

110. In the circumstances, this does not arise for determination. However, we read and heard considerable evidence and submissions directed to this issue, so we set out our findings on it briefly.

111. It is the view of the tribunal, led by its lay members in this context, that R1 did take all reasonable steps to prevent in particular harassment by a Gallery Assistant of a colleague.

112. We have set out the material evidence within the Facts part of these Reasons, to which we refer. We consider that, taken together, those measures were such as a reasonable employer might be expected to put in place and that they complied with the example set of measures given at para 10.52 of the EHRC Employment Code set out above.

113. Our only reservation concerns the fact that as at May 2019 the most recent training specifically in relation to sexual harassment from the perspective of the potential harasser was delivered in 2016. It would be preferable for such training to be repeated at least once every two years. However, of itself we did not consider that this undermined R1's ability to rely on s. 109(4).

Conclusion

114. In the circumstances, we did not determine issues of limitation raised by R1 and GA.

115. The claims are dismissed.

R2's application after oral judgment was given

116. After we gave an oral judgment with brief reasons, GA applied for his name to be anonymised in the public records of this case. We heard submissions from all parties on that matter, with R1 supporting the request and C opposing it.

117. For the reasons we gave orally, we did not accede to that application. In brief summary: given the paramount importance of open justice, referred to a series of appellate authorities recently, we did not consider that there was any exceptional circumstance to justify anonymisation in this case, all the more given that we held that some of the texts sent by GA and the voicemails met the s. 26 definition of harassment, albeit not done in the course of his employment.

Oliver Segal QC Employment Judge

18 October, 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON:

18/10/2021

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