

Are not well founded and are dismissed.

Reasons

1. By this claim the claimant brings a claims of discrimination on the grounds of sex and / or sexual orientation and victimisation, as are set out below. He previously brought claims of age discrimination and breach of contract in the failure to pay notice pay but both were withdrawn at the Case Management Preliminary Hearing held by EJ Richardson on 18th February 2021.
2. The tribunal has heard evidence from the claimant; and on behalf of the respondent from Luke Tomkinson, Kristian Williams; Andrew Newcombe; Jenny Newcombe ; Mark Newcombe; Lance Jobe, and Joanne Tomkinson.

Background Facts

3. The respondent is an advanced manufacturing company, designing and manufacturing tooling for the aerospace and power generation sectors. It is a relatively small family run business with eleven employees and was established twenty four years ago by Mr Mark Newcombe (Director) and Jenny Newcombe his wife (Financial Director). The Operations Manager is Andrew Newcombe (their son) and the Office Manager Joanne Tomkinson (their daughter). The claimant signed an apprentice toolmaker agreement on 20th September 2019 for a fixed term expiring on the completion of his Level 2 and 3 NVQ course. He worked for four days a week and attended Plymouth College on the fifth for the academic element of the apprenticeship. He was dismissed on 18th February 2020.
4. Save for those purely factual background matters nearly every factual allegation made by the claimant against the respondent, and the respondent against the claimant, is in dispute and we will set out our conclusions in respect of them when considering the claims.

Claims / Issues

5. The claimant brings claims of direct sex and/or sexual orientation discrimination and harassment (the factual allegations in respect of which are set out below); and victimisation.

6. The factual allegations are as follows and as recorded in the case management order. The allegations of direct sex/sexual orientation discrimination and/or harassment are:
- i) *Did the respondent say to the claimant "fuck off you cunt".*
 - ii) *Did the respondent say to the claimant "Your mum was great in bed last night. She's a bit of a slag."*
 - iii) *Did the respondent refer to the claimant as "babyface".*
 - iv) *Did the respondent send themselves a text using the claimant's mobile phone saying "You have a really big willy".*
 - v) *Was the claimant pressured to tell the respondent about his sexual orientation.*
 - vi) *Was the claimant repeatedly called "gay".*
 - vii) *Was the claimant asked if he had a girlfriend;*
 - viii) *Was the claimant called a virgin and/or a gay virgin;*
 - ix) *Was the claimant asked "How's your ass? Is it still sore"*
 - x) *Did the respondent draw in the claimant's work area and on the claimant's work overalls a penis;*
 - xi) *Did the respondent pass comment that the claimant was obsessed with "cock";*
 - xii) *Was the claimant referred to as "the gay boy", the fucking queer" and "dirty little faggot";*
 - xiii) *Was the claimant subjected to the comment "your mum takes it up the ass and that's probably why you do";*
 - xiv) *Was the claimant subjected to anal pornography and images;*
 - xv) *Was the claimant asked are you sure you don't like anal?*
 - xvi) *Did the respondent say to the claimant "Luke said you take it up the ass. Do you? I bet his mum does though" and "I bet Ryan does as well though"*
 - xvii) *Discriminate against the claimant by dismissing him?*

7. The allegations in relation to victimisation are that :-
- i) *The alleged protected act was making “it clear to Andrew Newcombe and Luke Jobe that he did not wish them, or generally others, to discuss his sexuality;*
 - ii) *The detriment alleged is “In the period leading up to dismissal, subjecting the claimant to unreasonable scrutiny of his work.”*
8. Time Limits – The respondent contends that with the exception of his dismissal, all other claims are out of time.

The Law

9. The legal principles we must apply are not in dispute (and as is set out below the disputes in this case are essentially factual) but the relevant sections of the Equality Act 2010 are set out below:-

13 Direct discrimination

(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.

26 Harassment

(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.*

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or*
 - (b) A believes that B has done, or may do, a protected act.*
- (2) Each of the following is a protected act—*
- (a) bringing proceedings under this Act;*
 - (b) giving evidence or information in connection with proceedings under this Act;*
 - (c) doing any other thing for the purposes of or in connection with this Act;*
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.*
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
- (4) This section applies only where the person subjected to a detriment is an individual.*
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

10. Neither direct discrimination or harassment require the claimant to possess the relevant protected characteristic. In this case in respect of the claims in respect of the protected characteristic of sexual orientation the allegation is that the respondent or its employees perceived him to be gay whereas he is in fact not. This does not affect his ability to bring the claims. The majority of the allegations of harassment appear to fall more naturally as allegations of direct discrimination and/or harassment related to sexual orientation rather than sex and we will consider those claims first.

Direct Discrimination /Harassment related to sexual orientation

11. The allegations that are on their face (if true) self-evidently homophobic are allegations v) – xvi) above.
12. The factual allegations are that the claimant contends that at the Christmas party Andrew Newcombe kept making homophobic comments towards him, at which two other colleagues Max Thomas and Sean Devlin were laughing. Two other colleagues Harry and Charlie made homophobic comments towards the start of the evening but stopped when they saw it was making the claimant upset.
13. On numerous occasions in January 2020 Lance Jobe asked him if he were gay, said that he must be as he didn't have a girlfriend and insulted him in general about being gay.
14. Andrew Newcombe and Luke Tomkinson pressurised him into telling them whether he had a girlfriend; called him virgin or gay virgin; and allegation xvi) is in fact a composite allegation of a conversation between Lance Jobe and Andrew Newcombe about the claimant.
15. He alleges that the penises were drawn in his work area and overalls by Luke Tomkinson and Andrew Newcombe; and that the comment about being "obsessed with cock" was made by Luke Tomkinson; who also on occasions "too numerous to count" subjected him to watching anal pornography videos and images at lunchtime and made the comment "are you sure you don't like anal".
16. Further he states that comments made to him on a daily basis by Andrew Newcombe and Luke Tomkinson included "Oi gay boy; "Where's the fucking queer" "Dirty little faggot" ".mum takes it up the ass and that's probably why you do" " How's your ass? Is it still sore?"
17. There is therefore evidential support for all the allegations set out above. The claimant's evidence is that they were all unwanted and they are all self-evidently homophobic and related to the protected characteristic of sexual orientation. If those comments were made the only remaining question would be whether they had the "purpose or effect" of creating any of the proscribed effects or environments. If the evidence is correct it would be extremely difficult to avoid the conclusion that that was their purpose; and in our view impossible to avoid the conclusion that that at least was their effect.
18. None of the matters set out above are in dispute if the comments were made, and it follows automatically that if we accept the claimant's evidence that those allegations will necessarily be made out as allegations of harassment related to sexual

- orientation and the claimant's s26 harassment claims will succeed. However the fundamental question before us is whether they were made. The evidence of Andrew Newcome, Luke Tomkinson and Lance Jobe in particular (against whom the allegations are primarily made), and the respondent in general, is that they are entirely untrue and that the allegations have been invented by the claimant.
19. In respect of allegations i) – iv) they are not obviously on their face homophobic, i.e. not obviously related to sexual orientation within the meaning of s26. Equally however they are factually in dispute in any event, and will stand or fall factually with the other allegations for the reasons set out below.
20. Dismissal – The direct evidence from the respondent as to the reasons for the claimant's dismissal are in essence that by February 2020 he had fallen way behind the point which he should have reached in his apprenticeship, and was not producing work to an acceptable standard, despite being provided with significant amounts of assistance. Moreover he was recorded as having achieved 0% in his coursework at Plymouth College.
21. In respect of his coursework the evidence from Joanne Tomkinson is that in early January 2020 his assessor visited and it was revealed that he had 0% towards his coursework. The claimant blamed the college's online work system and as a result a meeting was arranged with Ms Dee Davey from the college which was attended by the claimant, Ms Tomkinson, Andrew Newcombe and Lance Jobe. At the meeting they discovered in addition that the claimant had also been late most weeks for college, and they describe his attitude towards Ms Davey in the meeting as being rude and unacceptable. A further meeting was arranged at 8.15 am the following day for the claimant to meet Chris Edmonds from the college to get back on track with his college work. Unfortunately the claimant was late the following day and did not attend this meeting.
22. In respect of his work the respondent's evidence is that there were problems with persistent lateness which had been addressed before Christmas 2019, but that by January 2020 Andrew Newcombe and Lance Jobe had become concerned at how little progress he was making; and that the feedback from other employees that were assisting him was that his attitude was very poor, and showed no willingness to learn. As a result they decided that they would take more responsibility for his training and would go back to basics. They describe showing how to "block down" a piece of aluminium. This is a very basic task that should have been learnt in the first few weeks of training. However he took five attempts to get it right; and then took a further five attempts to get a second block right. Mr Mark Newcombe subsequently spent time showing him how to drill holes in a piece of aluminium. Having been shown how to do it after lunch the claimant had gone back to doing it his way and the block had to be scrapped. If this evidence is correct, he had by this stage been

- assisted by all levels of the respondents employees and a consistent picture emerged of the claimant failing to improve.
23. As a consequence there was a management meeting on 17th February 2020 to discuss the claimant's lack of progress and the decision was taken to dismiss him.
24. The claimant contends that the respondent's account is not true and that the tribunal should not accept it as representing the true reason for dismissal. Firstly the account above is entirely self-serving whereas the documentary evidence is more nuanced. Whilst it is true one college supervisor (Gary Sayer) reported problems with his work very similar to those set out above another (Dave Derbyshire) was highly complementary of its quality. Secondly shortly before the dismissal the respondent had been raising concerns with the college and was trying to arrange to meet Mike Jones. Dates of the 18th February and 20th February had been suggested but the claimant was dismissed before the meeting took place. The claimant contends that this is inherently suspicious and that in reality the respondent must have had some other reason for dismissing him.

Respondent's Allegations

25. Not only are the claimant's allegations disputed, but the respondent makes a number of counter allegations which in turn the claimant alleges are untrue and invented.
26. Christmas Party – The respondents evidence is that after the Christmas lunch they went to The George Inn. Jenny Newcombe was sitting at a table with the claimant, her husband Mark Newcombe, and her daughter Joanne Tomkinson. As they were talking the claimant asked the two women if they knew what "nugget porn" was. Mrs Newcombe replied "what are you talking about", at which the claimant got his phone out apparently in anticipation of showing them. This was heard and seen by Mark Newcombe who asked Andrew Newcombe "to intercept and make sure that Ryan did not show my wife anything". The claimant's case is that this is a complete invention.
27. In addition the respondent alleges that allegation iv) of the claimant is straightforwardly an invention. Andrew Newcombe did not ask for the claimant's phone, and did not send the message to himself. The claimant has invented this to cover up the fact that the message was demonstrably sent by him from his phone.
28. It is not in dispute that the claimant had not made any complaint about any of the allegations prior to his dismissal; and it was not challenged that the first that at least Mr Mark Newcombe and Ms Joanne Tomkinson knew of them was when they received the claim form. Their evidence is that they took advice and compiled a list of questions derived from the allegations in the ET1. Then on 30th July 2020 they called

- a number of members of staff to meetings, and without disclosing the allegations in advance asked for their responses.
29. From those responses a number of further allegations against the claimant emerged.
30. In relation to allegation ii) (*Your mum was great in bed last night. She's a bit of a slag.*) Andrew Newcombe alleged that this or something like it had in fact been said by the claimant to Luke Tomkinson; Kristian Williams alleged that the claimant had made similar comments to him about his own mother "numerous lunch times"; and Luke Tomkinson confirmed that on more than one occasion the claimant had made a similar comment to him.
31. Similarly both Kristian Williams and Luke Tomkinson alleged that it was the claimant who showed pornographic videos on his phone in the canteen at lunchtime; and Luke Tomkinson states that the claimant had asked him if he had heard of "nugget porn" and showed him some on his phone.
32. Accordingly the respondent alleges that allegations ii) and xiv) are specifically not conduct to which the claimant was subjected, but conduct carried out by him. In addition they rely on the fact that in the course of these interviews all of the allegations were consistently and uniformly denied save that a number accepted that at the beginning of his employment they had in conversation asked the claimant if he had a girlfriend and one (Joe Goddard against whom the claimant makes no allegations) said that after the claimant said no to that question he said "what about a boyfriend Ryan said "no I'm not gay."
33. As set out above the tribunal has a stark conflict of evidence which we have to resolve. Our conclusions are set out below.

Victimisation

34. The protected act alleged is that the claimant made it clear "*to Andrew Newcombe and Luke Jobe that he did not wish them, or generally others, to discuss his sexuality*". It is denied by Andrew Newcombe and Lance Jobe that they had ever done so and as a result they also deny that any such conversation took place. In fact the claimant 's evidence was that his method of communicating his desire for them not to discuss his sexuality was a good deal more direct, and that he had simply told them to "fuck off" when they had made homophobic comments to him.
35. Even if this was said and constitutes a protected act (both of which are in dispute), in respect of the detriment the respondent's evidence is that far from being subjected an unreasonable level of scrutiny, that following the concerns as to his performance in

January 2020 that he was provided with every assistance to improve from including from the most senior levels of management in the company. This is an advantage, not a detriment, and the respondent contends that it is of a piece with the claimant's general attitude both to his college work and his work for them, that he should regard the assistance provided as a detriment.

Factual Conclusions

36. It will be apparent that there is no agreement between the parties as to almost any of the basic facts, or the interpretation of those facts, and we are faced with the starkest of conflicts as to the factual allegations. We confess that the tribunal has found this an exceptionally difficult case to resolve. The central difficulty is that a number of the witnesses gave compelling and apparently honest and reliable evidence. Demeanour, (i.e. a general assessment of the way a witness gives his or her evidence) is in and of itself an unreliable method of assessing credibility but in this case does not assist us in any event. Having heard from the claimant we could see no reason to doubt the accuracy or reliability of his evidence. It was compelling and apparently honest, and not undermined in cross-examination. Equally however, the same was true of a number of the respondent's witnesses, and in particular Mark Newcombe, Jenny Newcombe and Joanne Tomkinson, whose evidence was equally as compelling, apparently honest and reliable, and equally entirely withstood cross-examination. However, given the conflict, and particularly the conflict between them as to the events at the Christmas party, about which one of the parties is necessarily not telling the truth, the impression the tribunal had of one or more of those witnesses from their oral evidence must be mistaken.
37. It follows that we have to make our determination on some other basis. None of the factors set out below is in and of itself conclusive but taken together they lead us to the conclusion that on the balance of probabilities we accept the respondent's evidence and not the claimant's.
38. Firstly it is not in dispute that during his employment the claimant made no formal complaint to the respondent or, more significantly, spoke to anyone outside the respondent including in particular anyone at the college or his parents about the matters he now alleges were occurring. In our judgement that is surprising in and of itself, and also means that there is no contemporaneous support for any of the allegations.
39. Secondly there is contemporaneous documentation supporting a number of the respondent's contentions including notes made after the meeting with Ms Davey, the problems with his work, and a conversation with the claimant's mother shortly after his dismissal, all of which support the respondent.

40. Thirdly the nearest thing the tribunal has to an independent witness is Kristian Williams. Although not entirely independent as he is employed by the respondent, no allegation is made against him by the claimant, and both in his original responses internally and in his evidence before us he does not support the claimant; and in respect of some events specifically contradicts him and supports the allegations the respondent makes against him. It is in our judgement significant that his evidence from the point at which he was first made aware of the allegations until giving evidence in the tribunal are entirely consistent; and consistent with the evidence of the respondent's other witnesses.
41. Fourthly the allegations of Jenny Newcombe, Mark Newcombe and Joanne Tomkinson relating to the Christmas party are to an extent supported by Luke Tomkinson as to the detail of what was alleged (the reference to "nugget porn") although he was not present. We find it difficult to believe that the very specific reference to "nugget porn" can have been invented by them.
42. Fifthly it is demonstrably true that the concerns as to the claimant's coursework and work for the respondent are supported by contemporaneous documentation and undisputed events such as the meeting with Ms Davey. It follows in our judgement that the claimant's allegations that these concerns, particularly in relation to his work, are unfounded and invented to justify dismissing him are not supported by the contemporaneous documentation.
43. Finally, and in our judgement most significantly, the nearest the tribunal has to contemporaneous evidence are the accounts given by the respondents' staff on 30th July 2020. There are in essence only two possibilities. Either the respondent is telling the truth and witnesses who were not forewarned of the questions gave very similar responses to the questions, which if true would strongly suggest that the responses were reliable and accurate; or alternatively all of the witnesses are lying and the respondent on receipt of the claim form engaged in a wholesale conspiracy to concoct a fraudulent defence to the claims. In our judgement whilst this theoretically might be true it is wildly improbable and there is absolutely no evidence to support it.
44. As a result we have concluded that we accept on the balance of probabilities that the accounts given by the respondent's witnesses; and it follows automatically that we are not satisfied on the balance of probabilities of the accuracy or reliability of the claimant's evidence. .

Conclusions

45. All of the claimant's claims rest on us accepting his evidence as to the primary facts. If we do not they are all bound to fail. As for the reasons given above we have

decided that on the balance of probabilities we accept the respondents' evidence as to the facts it follows that all of the claimant's claims must be dismissed.

Employment Judge Cadney

Date: 29 November 2021

Judgment & reasons sent to parties: 8 December 2021

FOR THE TRIBUNAL OFFICE