



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112446/19
Held by Video in Glasgow on 14, 15, 16 and 17 June and 29 July 2021
Employment Judge S Walker
Tribunal Member A Grant
Tribunal Member F Paton

Ms A Smith

**Claimant
Represented by:
Mr G Cunningham,
Advocate**

Allied Vehicles Limited

**Respondent
Represented by:
Mr S Hughes,
Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

1 The claim of harassment succeeds in respect of the comment from Stuart Getty only and the respondent is ordered to pay to the claimant the sum of £1000 as compensation plus interest, totalling **£1160**.

2 The other claims of harassment are dismissed.

3 The claim of direct discrimination in respect of the comments from Stuart Getty succeeds. No further compensation is awarded as this is covered by the award for harassment for the same incident.

4 The other complaints of direct discrimination claim are dismissed

5 The claimant did like work with her comparator, James Haldane-Dorrian, for the period of her employment and the respondent has not established a material factor defence.

6 The sex equality clause therefore operates to vary the claimant's terms and

conditions so that her annual salary was £30000. The respondent is in breach of contract, as varied, and is ordered to pay to the claimant the sum of £1232 in respect of arrears of pay, plus interest, totalling £1331 .

7 Both awards are subject to interest at 8%. This amounts to 2 years interest for the claim of harassment (£160) and 1 year's interest, taken from the mid point , in relation to the like work claim. (£99).

8 The total sum payable to the claimant is therefore **£2491** .

REASONS

Introduction

1 . The respondent's business is converting vehicles for disabled access.

2. The claimant was employed for just over 3 months as a Team Leader in Production. The claimant complains of harassment, direct discrimination and a breach of the equality clause in respect of her pay. The hearing was listed in person. Evidence was led from the claimant and, for the respondent , from

3 employees - Donna Mackie (Human Resources Business partner), Chris Baird (Assistant Production Manager) and Kevin McCafferty (Sales Director). Parties lodged a joint set of productions.

3. The claimant had applied for a witness order for James Haldane-Dorrian. This had not been issued. There was discussion around this matter throughout the hearing leading to a witness order being issued on the understanding that Mr Haldane-Dorrian was willing to attend. In fact, it transpired he was engaged on a delivery contract for the week. It was agreed that the hearing would be continued for a day to allow Mr Haldane-Dorrian to attend by video link.

4. That day was listed for 29 July 2021 . Mr Haldane-Dorrian attended and gave evidence by video. There was discussion around further evidence from the respondent but in the end, due to difficulties with the potential witness attending, Mr Hughes decided not to call any further witnesses,

5. After Mr Haldane-Dorrian gave evidence, there was a discussion about whether the claim contained a complaint of discrimination and/or harassment in relation to alleged constructive dismissal. Mr Cunningham made an application to amend, without objection, which was granted.

6. This was to add to the ET1, in paragraph 19, a new sub paragraph (c) as follows:

"The discriminatory conduct is a breach of the implied term of trust and confidence . It is a fundamental breach of contract. The claimant resigned in response to the breach. She was dismissed in terms of s39(2)(c) and s39(7)(b) if the Equality Act."

7. Both representatives made submissions, again on video link. These were provided in writing and supplemented orally and the Tribunal is grateful to them for providing these.

Findings in fact

8. Prior to working for the respondent, the claimant had worked in a number of jobs. From March 2009 to September 2011 she managed , and was the licence holder for, the Railway Tavern Bar where she was responsible for stock purchase, control and audit, banking and payroll , all staff matters, agreeing contracts with suppliers and liaising with the local authority about the Licence. She then worked as a Team Leader for Houston Bottling Plant from May 2011 to July 2016 where she managed a production line. She was responsible for quality, efficiency and productivity, health and safety and staff.

9. She then worked in customer service with Teleperformance UK from July 2016 to March 2017 and as a Leader and Coach for Ascensos UK from March 2017 to June 2018 where her primary role was in relation to staff performance - training, recruitment and development. She was trained in active management in this role. From June 2018 until her employment by the respondent she worked from BT as an operator, again in a call centre environment handling emergency calls for military.

10. The claimant applied for a job as a "Team Leader" in the Production Department with the respondent. The job was advertised at a salary of £30000 per annum. She was interviewed by John O'Conner and offered the job. He said that he could not say exactly what salary she would be offered but he expected it to be about £27000.

Terms and conditions

11. The claimant was offered the position at a salary of £25000. She was told there was a three-month probation period after which the claimant expected her salary to increase. She accepted the role and started on 24 June 2019. On the first day, John O'Conner said to the claimant that if she kept up to the KPIs (Key performance indicators) her salary would be increased to £30000.

12. Her gross weekly pay was £480.77 and her net weekly pay was £391.30.

13. The standard working hours were 4 days Monday to Wednesday from 7 am to 6 pm and Thursday from 7 am to 5.30 pm.

14. The claimant's offer letter stated that she would be auto enrolled into the Peoples Pension (5% employee contribution and 3% employer contribution). After 6 months she would be eligible to join the company pension scheme.

15. Overtime was regularly worked on Fridays but there was no contractual right to payment. The claimant was not aware, at first, that time off in lieu could be asked for.

The Indy-RE line

16. There were a number of different production lines each of which had at least one Team Leader.

17. The claimant shadowed another Team Leader, Tam Corner, for the first two weeks of her employment. At first, he said that he did not want to train somebody else as the previous 4 people he had trained had all left. The claimant took offence to this comment and, although Mr Corner did in fact

train her, she complained about the comment.

18. The claimant was to manage the Indy-RE production line. This was a straightline process with 9 consecutive build stages in production where a Ford car, the Independence RE, was modified to allow for wheelchair access.

19. The stages started with strip out (removing seats, bumpers , side panels and interior roof lining, the fuel tank and some bolts.) At the next stage, bars were fitted, the floor was cut-out and fixings put in for tip and turn seats. These are seats that allow for room for a wheelchair. Next the new floor would be welded back in. This was followed by cables being put in. The wheels were then removed and the exhaust and fuel tank reattached. This was followed by an electrical stage where rewiring was done and an external rod bar was fitted. Then an interior wooden floor was fitted at the back of the car , then interior floor and trims were added. Finally seats would be refitted, new seatbelts, an electric winch and appropriate stickers added.

20. There were 9 vehicle assemblers (VAs) working on the line with 2 working off line and, while the claimant was employed, there were also 2 trainee VAs. Each stage was allocated a notional 2 hours for completion.

21. Occasionally electric steps had to be fitted. This was done by a different employee who was not assigned to the Team. It would add about 6 hours to the build of a car.

22. Once the car had completed the 9 stages, the car went for a quality check. After that the car went to Post-Delivery Inspection (PDI) This took place in another building. The cars were driven there and then queued. As well as inspection, they were valeted and had a test drive. If cars did not pass the quality check or PDI, they would be returned to the production line to be sorted.

Rifter line

23. This was a separate production line converting a Peugeot Rifter Horizon ("the Rifter line"). This was a smaller car than the Indy-RE.

24. It was not a straight-line production as there was space for vehicles to come off the line for specific jobs to be done.

25. The line was in a Y shape. All cars came in at the one place and then some split to a "side line" if they had non-standard work that had to be done. One Team leader managed the main line with another managing the "side line" when the cars came off the main line.

26. The length of the line was shorter than the Indy-RE line because of the Y Shape.

27. When the claimant was employed, "Gary" and "Alfie" both worked as team Leaders on the Rifter line. Alfie managed the "side line". Gary wanted to go back "on the tools" and James Haldane-Dorrian was appointed to replace him as Team leader.

Mr Haldane-Dorrian

28. James Haldane Dorrian was appointed as a Team Leader from 22 July 2019. His letter of appointment was 20 June 2019 to start on 22 July 2019. He was paid £30000. He was not on a probationary period. Other than that, his terms and conditions were the same as the claimant's.

29. Mr Haldane-Dorrian's most recent experience before joining the respondent was as Lead Manufacturing Operator (Team Lead) with Thermo Fischer Scientific from May 2016. Before that he had worked with the same company on the Manufacturing Documentation team as a Materials Controller. Before that, from 2007 - 2016 he worked for the same company as a Material Handler in the Distribution Team and before that he had various jobs as forklift driver, hotel porter. From 2004 - 2006 he worked for Recruit Retail Services as a Team Leader/Forklift Driver.

30. Soon after the claimant left, Mr Haldane-Dorrian was moved to become Team Leader on the Indy-RE line. His salary did not change.

Working environment

31. In the Production area there were between 60-80 staff working on the floor. The claimant and one vehicle assembler were the only females on the floor. There were women in the office. The claimant and Mr Haldane-Dorrian both reported to Kevin Thomas who in turn reported to Angela Horn

32. It was a typical manufacturing environment with jokes and people teasing each other. The language could be quite vulgar. For example, when Angela Horn wanted to stop an employee touching his crotch, she said something like, "Why do men have to keep touching themselves to see if their penis is there? How would you feel if Angela and I were touching our breasts all the time." The claimant considered this to be unprofessional.

33. The claimant enjoyed a good working relationship with James Haldane-Dorrian and they would sometimes have a joke on the floor. She was also friendly with Stephen Geoghan who worked on her line and he would call her "cupcake".

Targets

34. There were challenging targets for each line to meet. The Indy-RE target was for 20 cars to be completed each week. While the claimant was team leader, the line was generally producing 16-17 cars per week. The target for the Rifter line was 50 completed cars.

35. Every night at 6, there was a meeting of the Team Leaders at a white board to say where they were in relation to the target and whether anything was affecting the target.

36. The claimant worked every Friday she was employed although this was outside her contractual hours. She was not aware at first that she could get TOIL. She did not ask for it.

37. The claimant found the targets extremely difficult to meet and considered they could only be met if everything went to plan on the line and there were no additional tasks, such as two sets of tilt and turn chairs or electric steps.

Headlock incident

38. At some point, Chris Baird, who was another Team Leader working in PDI at the relevant point, said to the claimant, that he would “put her in a headlock” if she sent another car over that was incomplete. He did not mean this to be a threatening comment.

39. The claimant asked what he meant and he led her to PDI where he showed her a loose petrol cap. He said “Make sure your guys are fitting bolts”.

40. The claimant was unsure what the issue was and said she would have to speak to Gordon Ireland in Quality about it. Having done so, the claimant explained that the VAs did not touch that part and any fault must be from Ford. She relayed this to Chris Baird who said “Fine”.

41. The claimant was annoyed at the way that Chris Baird had spoken to her although she did not say anything about it at the time to him or to anyone else.
“Do you know he’s married” incident

42. On 8 August 2019, Stuart Getty who worked on the Indy-RE line was irritated that the claimant had not actioned his request for some tools. He considered that the claimant was showing favouritism to Stephen Geoghan. He said to the claimant “You do know he’s married, don’t you?”. The claimant took this to be a suggestion that she and Stephen Geoghan were having a romantic relationship.

43. The claimant was upset at this comment. She said something like “I beg your pardon?” and Stuart Getty said “I say it as I see it”. His demeanour was angry.

44. She texted Debra Mackie and asked for a chat. She was upset and crying. When Debra Mackie came down. The claimant was on the line and said “don’t ask” as she didn’t feel able to discuss it.

45. After lunch, about an hour later, the claimant spoke to J H-D who said that the claimant should raise the matter with Angela Horn or Kevin Thomas. The claimant saw Lynsey Shand, Angela Horn’s assistant, and told her what had happened. Angela Horn came out and asked the claimant if she was OK, the claimant started crying and went into the toilet. AH followed her and texted Debra Mackie to join them.

46. The claimant told them both what had happened and Angela Horn was annoyed and said “we’ll get him in for a chat”. The claimant was not asked if she was happy with this suggestion but nor did she indicate that she was not. She followed AH and DNM into the office. She understood Debra to have said to her not to say anything.

47. Stuart Getty was called over the tannoy and came into the office. Angela Horn asked if he knew why he was there? He said no. Angela Horn said, “You’ve been accusing Angela of sleeping with a married man”. He shrugged and said “Aye”. Angela Horn asked how he would feel if that was said to his wife or daughter? He said he would “need to be in receipt of all the facts.” Angela Horn said she was “going to assume it was a moment of madness” and Stuart Getty said “Maybe I should have chosen my words better”. Angela Horn concluded the meeting by saying that “maybe he should and she would not be tolerating anything like that”. Stuart Getty made a flippant remark about

getting a payrise and went back on the line.

Thicker skin

48. Following the meeting with Stuart Getty, Angela Horn said to the claimant she would need to grow a “thicker skin” and that “things like this happen all the time and worse”.

49. The claimant went back on the line. Chris Baird called the claimant about a washer missing in PDI. This was something she had to speak to Stuart Getty about. The claimant asked Stuart Getty if he had been to PDI before? He said not and so she showed him the way. This was observed by Angela Horn who said to the claimant she was glad to see that she was working okay with Stuart Getty. If she had been avoiding him, Angela Horn said they would be “having a different conversation”.

50. The next day, 9 August 2019, the claimant approached Angela Horn in the office . Angela Horn asked how she was doing? The claimant said that she didn't want to manage Stuart Getty and asked if he could be moved. Angela Horn said yes and that in a couple of weeks there would be a new car and he could be put on that. Angela Horn said something like “watch yourself out there, be careful”.

The grievance

51. The claimant submitted a grievance the next day 10 August 2019. In the grievance she stated that she would not be attending at work

52. The grievance covered a number of matters and included:

- The married man incident
- Contractual working hours being disrupted and the practice of having a meeting every night at 6 pm (and 5.30 on a Thursday) . The claimant said she had built up 20 hours unpaid overtime over 2 weeks. She said that she was regularly not leaving till after 7 and starting again at 7 the next day without a full 12 hour break.
- CB "putting her in a headlock and embarrassing her in front of colleagues, comments from Angela Horn about her size and comments from AH about make colleagues touching themselves on the floor.
- Issues around the targets being unachievable.
- The claimant had been told to get rid of her desk and chair - KT had said she was on her chair all the time.
- Salary less than others who started at the same time.

53. The grievance said that the claimant had contacted Acas about the possibility of an employment tribunal for constructive dismissal. She also made allegations of harassment, bullying and discrimination (stating that “being female is a protected characteristic”)

54. She said [it] "went past raising a grievance against the company, Angela Horn, Chris Baird, Kevin Thomas and Stuart Getty. I cannot foresee any acceptable outcome as I no longer feel safe working at Allied Vehicles” .

55. However, she said she wanted to make it clear that she was not resigning but making them aware of why she would not be attending work. She said that

they could email to discuss . If not she would pass her details to her legal advisor who would be in touch.

56. Kevin McCafferty, Sales Director, was appointed to hear the grievance. He had no previous contact with the claimant and did not work in the Production Department. He arranged to meet the claimant at her home, accompanied by Donna Cook of HR to take a statement. The notes of the conversation run to 10 pages.

57. Mr McCafferty asked the claimant to set out her concerns. The claimant starts with "From day one it was awful". She then talked about the training incident with Tam Corner. She said "you just don't feel like you're adequate enough for the business" and described how Angela Horn promised people that 20 cars would be built but the claimant had had no training. She describes the Stuart Getty incident in significant detail and then discussed the meetings and working hours. When prompted, she briefly describes the headlock incident and some other incidents but then returns to the problems with meeting targets and inadequate training.

58. Kevin McCafferty asked that claimant if he had missed anything and whether there was anything she hasn't brought up. The claimant mentions some reporting issue. She did not mention the issue of equal pay with other Team Leaders.

59. Donna Cook sent minutes of the meeting to the claimant. The claimant responded with comments. In the second (and last) page, she concluded with 4 bullet points she would like to be added. The second bullet point states "Salary difference between the new starts in the same position".

60. Mr McCafferty then interviewed Tom Corner, Kevin Thomas, Angela Horn, Lynsey Shand, Stephen Geoghan, Chris Baird, James Haldane-Dorrian and Debra Mackie. Stuart Getty was not at work and refused to be interviewed but he provided a statement for the investigation.

61 . Following this, Mr McCafferty did not uphold the grievance. He concluded as follows;

• **Stuart Getty**

The comments were nothing more than a throwaway comment and there is no evidence to suggest any kind of discrimination , sexual or otherwise occurred and he believed that Angela Horn acted swiftly to address the issues". He said it was "unfortunate " that the claimant did not express a request to hold the meeting separately and he concluded that Angela Horn had confirmed that the claimant would not have to manage Stuart Getty.

Disruption of contractual hours

He stated that having spoken to Kevin Thomas the process has been changed to that meetings were now held between 1 -3 to ensure attendees finished on time. He stated that there was a TOIL system and any additional hours worked would be given back to the claimant.

Chris Baird

He accepted that Chris Baird's comments were "unprofessional" and he would address the matter but he did not accept that the actions were "unreasonable".

Kevin Thomas

He considered there "is no evidence to corroborate the event mentioned in your grievance"

Angela Horn

He stated that Angela Horn's response was - that the thicker skin comment was a "tough love approach", that Angela denied saying "be careful out there" and denied having made any reference to her partner, Mark.

In respect to James Haldane-Dorrian touching himself, Angela Horn had said that she didn't want to make a big deal of the situation and treated it like someone picking their nose.

As far as the salary was concerned, Angela had said that the claimant had not worked on a production environment for over 8 years and had not Lean management, TQM or Kaizen experience.

Angela could not recall making the "Big Ass" comment and was confused about this. She then "clarified" it was a typing error and it was "AS" the claimant's initials.

Mr McCafferty concluded "I have been unable to find any valid reason to uphold this point"

• Tam Corner

Mr McCafferty confirmed that the claimant had received training from him and that the claimant had also received training from others. This point was not upheld "given the vast amount of training you received"

62. Mr McCafferty therefore advised that he had not upheld the grievance was in any respect.

Grievance appeal

63. The claimant submitted an appeal alleging

- i. Not all means of gathering evidence have been exercised
- ii. Misinterpretation of statements provided by employees/admissions of guilt in statements
- iii. False and inaccurate information
- iv. Employee speculation in statements
- v. Employee amusement at allegation
- vi. Non-use of comparators where discrimination, harassment and bullying took place
- vii. Judgment based on own perception.

64. The claimant said that she concluded that she did not consider that the investigation had been fair, impartial and non-biased.

65. The grievance appeal was heard by Gavin Gillies, Commercial Director.

66. The claimant provided 9 pages of comments on the grievance handling.

67. Mr Gillies concluded as follows:

CCTV footage was no longer available and, anyway, the quality of the footage was not sufficient to see facial expressions. He considered that it was not necessary to carry out further questioning.

ii. Although there was no apology from Stuart Getty, Mr Gillies concluded that there was recognition that what he said was not

appropriate and that he didn't mean to cause upset.

iii. While there may have been admissions of things that had been said, Mr Gillies concluded that these did not support the allegations of bullying, harassment and discrimination.

iv. The points highlighted did not form part of the grievance panel's decision not to uphold the grievance. Mr Gillies had questioned Angela Horn and confirmed that when she said the claimant had had training from John O'Conner she meant Kevin Thomas. He had also spoken to Angela Horn about the statements alleged to be made. It was "AS" on the board and not "ASS". Angela Horn had said that the claimant had told her (in the toilet) that she and Stephen Geoghan had cuddled each other and called each other "cupcake". Having "clarified" the matter, Mr Gilles said he saw "no reason to review" the decision.

v. Employee speculation was not taken into account in the decision.

vi. There was no evidence that staff found amusement in the allegation and that would not have formed part of the original decision.

vii. As there was no evidence of discrimination, harassment or bullying, the use of comparators was not deemed necessary.

viii. The questions were impartial and it was not accepted that Kevin McCafferty treated the claimant differently to others by not asking for their version of events.

68. The decision on the appeal was issued on 20 September 2019.

69. The claimant resigned with effect from 6 October 2019 having not returned to work. She said "Further to the recent grievance raised by myself regarding discrimination within the workplace I now confirm that I resign from my position as team leader of Indy RE line. I am disappointed at the conduct of Allied Vehicles and feel it would not be a safe working environment for myself to be in. Allied Vehicles have shown no support in this action and have made no effort to ensure my safety at work. Also the company values have not been displayed in the proceedings. I was discriminated against and unfairly treated in my time at Allied Vehicles and felt it necessary to bring this to light".

70. Although the claimant consulted her GP she is not on any medication or treatment.

71. The claimant has claimed Universal Credit from 4 September 2019.

72. She does not wish to return to Production Management and has not looked for employment in that field.

73. In November 2019, she gained employment with JBS (the office for PPE) at a weekly net pay of £349.97. She worked for them until she obtained a post with NHS Greater Glasgow and Clyde with effect from 4 December 2020 at a salary of £18500.

74. Her total earnings from JBS were £18198.44 (net).

75. Her current earnings are £377.23 a week (net). As at the first day of the hearing (14 June 2021), she had earned £10185.21 (net).

76. In her current job it will take 2 years to get to the top of her band which would

be £20800.

Observations on the evidence

77. Chris Baird, who gave evidence, is not a large person and has a jocular demeanour which did not support the claimant's assertion that she believed he was threatening her with physical violence. He did not recall the "headlock" incident specifically and appeared to guess at a different incident when he may have used that expression. The Tribunal accepted that such a comment had been made and accepted the claimant's more detailed account of the context in which this had been said. However, the Tribunal were satisfied that there was no intention by Mr Baird to upset the claimant in anyway and any interaction with her was not related to her sex. The Tribunal, particularly the members with their industrial experience, considered it likely that in this type of work environment, such joking interactions would be routine regardless of the sex of the recipient and would not be intended to be threatening nor would they reasonably be perceived as such by other workers.

78. The Tribunal heard evidence about another incident in the workplace from Chris Baird. These included an alleged incident where he said that the claimant was messing about with James Haldane-Dorrian and Chris Baird had told them to get off the cars in case they scratched them. Chris Baird said that the claimant and James Haldane-Dorrian had then started rubbing themselves along the cars to wind up Chris Baird. The claimant denied that this had happened. The Tribunal considered this was evidence of the kind of environment that existed in the workplace, similar to the incident where Angela Horn spoke to an employee about touching himself. The Tribunal considered these were examples of good natured joking interaction between work colleagues. They may have been in poor taste, and they may have been offensive to the claimant but the Tribunal did not consider these were indicative of a hostile or discriminatory environment.

79. The Tribunal did not hear evidence from some key players in the case. In particular, Angela Horn was not called as a witness. Therefore, insofar as incidents relate to her actions, the Tribunal has accepted the claimant's version of events as factual although it may not agree with her contentions as to motive.

Issues

80. The issues to be determined by the Tribunal are as follows:

81. Did the claimant do "like work" to James Haldane-Dorrian?

82. If so, has the respondent established that there was a material factor that explains the difference in pay that was not itself discriminatory?

83. Did any of the following comments constitute harassment in terms of s26(1) of the Equality Act or less favourable treatment because of sex in terms of section 13 of the Equality Act:

- (i) Chris Baird's comment about putting the claimant "in a headlock"?
- (ii) Stuart Getty's comment "you do know he's married, don't you?"
- (iii) Angela Horn's comments that the claimant would have to grow a "thicker skin" and directing her to "be careful out there"

84. Did the respondent treat the claimant less favourably because of sex or subject her to harassment in the way it dealt with her grievance?

85. Did the claimant resign in response to a breach of the implied term of trust and confidence so as to amount to constructive dismissal.

86. If so, was that dismissal, less favourable treatment because of sex or harassment?

Relevant law

87. The relevant law is not in dispute and is contained in the Equality Act 2010.

88. Insofar as any discrimination or harassment is established to have been carried out, the respondent is liable for those unlawful acts unless it can show it has taken all reasonable steps to prevent them. The respondent in this case does not seek to avoid liability on that basis.

89. As well as the legislation, the Tribunal must take into account relevant Codes of Practice issued by the Equality and Human Rights Commission.

90. S136 provides that the initial onus in a complaint under the Equality Act is on the claimant to establish facts from which the Tribunal could decide that there has been a breach, in the absence of an explanation. The burden then shifts to the respondent to establish that there has not been a breach.

91. A simple difference of treatment and a difference in sex will not suffice. There must be more but a Tribunal may draw inferences from surrounding circumstances which may include unreasonable behaviour.

Harassment

92. Section 26 (1) provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a protected characteristic and the conduct has the purpose or effect of (a) violating B's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

93. S26(4) provides that in deciding whether the conduct has the effect referred to in subsection 1(b) the Tribunal must take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

94. No comparator is required in a claim of harassment.

Direct discrimination

95. S13 defines this as less favourable treatment because of protected characteristic, in the current case, this is sex. This includes dismissal.

96. It is not necessary that the discrimination was consciously motivated by sex and sex need not be the sole cause provided it was an "important or significant cause" of the less favourable treatment. This is regardless of motive or intention.

Equal pay

97. Where a person is employed on work that is equal to a comparator of the opposite sex, she is entitled to equality in pay and other contractual terms unless the employer can show there is a material reason for the difference which is not discriminatory on the basis of sex. This operates by the implication of a "sex equality clause" into the claimant's contract of employment which varies the less favourable term(s) to be the same as the more favourable term(s) of the comparator.

98. Equal work may be established on 3 ways set out in section 65 of the Equality Act. The claimant relies on s 65(1) (a) and contends that her work was equal to her male comparator (James Haldane-Dorrian) because it was "like work"

99. This means that the work is the same or broadly similar and such difference as there are between their work are not of practical importance.

100. If that is established, the claim will succeed unless the respondent can show that the difference in terms (in this case, pay) was discriminatory. It does not have to be a good reason but must be a full explanation and must not be , in itself, discriminatory.

Constructive dismissal

101. One party may terminate a contract, without notice, if the other is in fundamental breach of contract. This may be a breach of an express or an implied term of the contract but it must go to the root of the contract.

102. In this case, the term relied on by the claimant is a breach of the implied term of trust and confidence. This is a term, implied into every contract of employment, that employer and employee shall not act in a way that is calculate or likely to destroy or seriously damage the relationship of trust and confidence between them without reasonable and proper cause. It is for the Tribunal to determine, objectively, whether there has been a breach of this term. A breach of this term will always be a fundamental breach of contract.

103. To amount to constructive dismissal, the fundamental breach of contract need not be the sole reason for the resignation but it must play a part in the decision.

104. If the conduct which establishes the fundamental breach is discriminatory or harassment, then a constructive dismissal may be founded on as an act of discrimination or harassment.

Discussion and decision

Equal Pay

105. Having listened to the evidence carefully, the Tribunal is in no doubt that the claimant and her comparator, James Haldane-Dorrian, did like work in terms of the Equality Act. The work was broadly similar. It does not have to be identical. Both were Team Leaders recruited under the same advertising campaign. They were responsible for managing a similar number of vehicle assemblers on a production line and scheduling work to ensure that the required number of cars were completed each week.

106. The car being altered on each line was different, the number of stages and the exact number of staff each managed was slightly different and some of the processes were slightly different. However, the Team Leader was not

required to carry out any of the mechanical work. It was a supervisory role. They both reported to the same person. The Tribunal was satisfied that the differences were not of practical importance and that the claimant did like work to Mr Haldane-Dorrian.

107. The claimant was paid £25000 as an annual salary and her comparator was paid £30000. The Tribunal notes that the claimant expected her salary to increase after a probationary period but, of course, she left before then.

108. It has been suggested by the respondent in the ET3 that Mr Haldane-Dorrian had greater experience in manufacturing and this was the reason for the difference in pay. This was also suggested by Angela Horn when she was interviewed as part of the grievance process. The Tribunal notes that what she says about this is factually incorrect (the claimant had been out of manufacturing for 3 years and not 8 and she did have some of the training qualification). That would not matter if it genuinely was the reason for the difference in treatment. A reason can be a material factor even if it is based on a mistake. It doesn't have to be a good reason provided it is not discriminatory.

109. The problem for the respondent is that, as the Tribunal has found that the claimant did like work to her comparator, the burden of proof is on the respondent to establish the reason for the difference in pay. In the absence of a witness who could speak to the decision making, and exactly what was taken into account in deciding on the pay level for the claimant and her comparator, the respondent simply did not discharge that burden. The Tribunal also considered it relevant that when the claimant left, James-Haldane-Dorrian moved over to become Team Leader of the Indy-RE line without any change of pay.

110. The Tribunal therefore considers that the sex equality clause operates to vary the claimant's terms and conditions to include a salary of £30000.

Harassment/direct discrimination

111. Some specific comments made by Chris Baird, Stuart Getty and Angela Horn were relied on as harassment, or alternatively, direct discrimination. In each case the Tribunal accepted that the incidents occurred , as alleged by the claimant and as set out in the findings in fact. The Tribunal also accepted that these and that these comments were unwanted by the claimant.

112. We will now deal with each of these in turn and consider first whether they amount to harassment and then whether they amount to direct discrimination.

Headlock comment

113. The first question is whether this comment was this related to sex? The Claimant suggested that such a comment would not have been made to a man who was taller and stronger than Mr Baird. That, of course , is not the test. Indeed, for a claim of harassment, there is no need for a comparator to be considered at all. The question is simply whether the conduct was related to sex.

114. The Tribunal did not consider that there was any evidence from which it could conclude that this comment was related to sex. It is not a comment that is

inherently related to sex. If the claimant is correct that the remark was made because she was quite small, the Tribunal does not accept that means the comment was related to her sex but rather to her size. The Tribunal considers it would be stretching the statutory language to say that because women tend, on the whole, to be smaller than men, that a comment made because of someone's size is related to their sex. That is more akin to a complaint of indirect discrimination and, in any event, was not the case before the Tribunal.

115. Even if the comment had been related to sex, the Tribunal was satisfied that there was no intention on the part of Mr Baird to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. They found Mr Baird to be a straightforward witness and his account of using the term in a jocular fashion to be persuasive. While he could not recall the exact incident referred to by the claimant, the Tribunal accepted that this was a routine workplace interaction intended by Mr Baird to be a joke. It was a passing comment.

116. Had it been required to rule on that matter, the Tribunal would not have accepted that the claimant in fact found the comment intimidating and, even if she did, it would have found it was not reasonable in all the circumstances to consider that it had that effect.

117. In the alternative, the claimant submits that this was direct discrimination. The Tribunal is not satisfied that the claimant has established facts from which it could conclude that a man in the same circumstances would have been treated differently. On the contrary, the Tribunal considered it likely that similar comments would be made by Mr Baird to male co-workers.

Married man comment

118. The Tribunal considered carefully whether this comment was related to sex. The clear implication of the comment was that the claimant and Stephen Geoghan had a romantic relationship that was closer than simply friends or that the claimant would like to have such a relationship.

119. The respondent's witnesses (who did not include Mr Getty) suggested that the reason for the comment was that Stuart Getty was annoyed as he considered that the claimant was showing favouritism to Stephen Geoghan to the detriment of Stuart Getty. This was also the reason provided by Mr Getty in his statement during the grievance process.

120. The Tribunal accepted that was the reason. However, the Tribunal considered that the way in which Mr Getty expressed that annoyance was related to the sex of the claimant. The specific comment was related to the claimant's sex by implying the claimant had a romantic or sexual interest in Stephen Geoghan. Further, the allegation of favouritism which was provided as a reason was itself rooted in a suspicion that the claimant, as a woman, was having some sort of relationship with a male colleague which was what was thought to lead to the favouritism. It was therefore related to her sex.

121. The Tribunal then considered whether the comment was made with the intention to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. In the absence of any evidence from Stuart Getty, the Tribunal had regard to the claimant's evidence as well as the evidence it heard about the subsequent meeting and the

statement made by Mr Getty to the grievance investigator.

122. The Tribunal considered that on the balance of probabilities, the comment was made to upset and demean the claimant (albeit Mr Getty may have had no idea quite how upset she would become) and therefore to violate her dignity. That is sufficient, therefore, to establish harassment with no need to consider further the effect the comment had and whether it was reasonable for the comment to have that effect.

123. In the alternative, the Tribunal considers that this was less favourable treatment because of sex. A male Team Leader may have been subjected to complaints from Mr Getty but it would not have been suggested that he was favouring a male colleague because he was having an affair with him.

124. The Tribunal therefore finds that this comment was harassment and, in the alternative, direct discrimination because of sex. The Tribunal was alert to a possible scenario where the male Team Leader was known to be gay, and a workmate might make such a comment. However, that was not suggested by the respondent and the claimant was known to be in a relationship with a man.

1 25. The respondent is liable for the actions of its employee.

"thicker skin" and "be careful" comments

126. Again the Tribunal was hampered as it did not have the evidence of Angela Horn who made the remarks. Mr Cunningham submitted that Angela Horn recognised by her comments in the meeting that the claimant had been wronged but that she was not going to do anything about it. In the context of a predominantly male environment, he submitted that that constitutes direct discrimination or, alternatively harassment. Mr Cunningham asked the Tribunal to draw an inference from the respondent's failure to call Ms Horn as a witness.

127. The Tribunal considered the matter carefully but did not conclude that the comments were related to sex. It appears in the grievance hearing that Angela Horn says her intention was to show "tough love". The Tribunal did not consider it was relevant that the comments arose after the incident with Stuart Getty which the Tribunal has found to be discriminatory and harassment. The Tribunal noted that the claimant had made a number of complaints over a very short period of employment. Even without Ms Horn's evidence, the Tribunal considered that the comments were more likely to be related to the perceived oversensitivity of the claimant rather than related to her sex. The Tribunal did not consider any adverse inference should be drawn from the absence of Ms Horn.

128. The Tribunal then considered whether this was direct discrimination. The Tribunal concluded that the cause of the treatment was the claimant's perceived over-sensitivity and not her sex. There was no evidence that a male Team Leader in the same circumstances would have been treated differently if he had similarly been perceived to be oversensitive. It is important that the Tribunal does not make its own stereotypical assumptions that a woman might be more sensitive than a man .

Handling of grievance and constructive dismissal

1 29. The claimant submits that she resigned because of the discrimination she had

suffered and the respondent's response to her complaints. It is submitted that the respondent's conduct was a fundamental breach of contract entitling the claimant to resign. As the resignation was prompted by an act or acts of discrimination, the claimant submits that dismissal is direct discrimination in terms of section 13 or alternatively harassment in terms of section 26.

130. The claimant submits that grievance process was not carried out in good faith and in any event was unreasonable. The claimant submits that

- Kevin McCafferty failed to ask the claimant about her grievance about equal pay. It is fundamental to a reasonable process that the substance of the grievance is investigated with the person who raised it.
- Angela Horn's explanation about the pay differential was inadequate, misleading, based on wrong information and self serving. Kevin McCafferty made no attempt to . He simply accepted Angela Horn's explanation.
- In fact the explanation relied on by Angela Horn was wrong the claimant had not been out of production for 8 years and the claimant's interview notes to not mention Kaizen or TQM training. The claimant says these matters were never raised with her. Debra Mackie , who took the notes of the claimant's interview would have known these things were not discussed at interview which brings her statement into question. This part of the process was a sham.
- The way the grievance was handled in also evidence from which the Tribunal would be entitled to draw an adverse inference.

131. The Tribunal considered the matter carefully. The Tribunal accepted that Mr McCafferty, assisted by HR, set out to investigate the claimant's grievance and that he believed he had carried out a thorough investigation. He had interviewed or sought to interview all the relevant people.

132. The Tribunal considers that there were a number of criticisms that can be made of the investigation but it does not consider it was a sham. Mr McCafferty simply relayed back to the claimant the explanations he was given by the various people he interviewed. He did not seek to challenge the explanations or denials from the witnesses and did not allow the claimant the opportunity to do so. He did not , in the Tribunal's view, properly investigate the complaints.

133. However, critically, the Tribunal did not consider that there was any evidence that Mr McCafferty acted in bad faith nor was there any evidence from which they could conclude that the failure to investigate thoroughly was related to sex. There was no evidence from which the Tribunal could conclude that the way that Mr McCafferty would have carried out the investigation differently if the claimant had been a man making similar complaints. There is no basis for the burden of proof shifting to the respondent.

134. Therefore, the Tribunal does not consider that the handling of the grievance was direct discrimination or harassment.

Constructive dismissal?

135. If the failure to carry out an adequate investigation amounted to a breach of the implied term of trust and confidence, it was not related to sex or less favourable treatment because of sex. The fact that the grievance included

investigating allegations of discrimination does not affect that. The claimant was unhappy about the handling of her grievance but the Tribunal has concluded that any failures were not acts of discrimination or harassment.

136. The claimant was clearly upset by the comment from Stuart Getty. However, although we have found this to be harassment and direct discrimination, we do not consider that the respondent's handling of this matter amounted to a breach of the implied term of trust and confidence by the respondent, either alone or as part of a wider pattern. On the contrary, the respondent took immediate and prompt action to make it clear to Mr Getty that the comment and the attitude underlying it was unacceptable. Angela Horn had agreed to the claimant's request that Stuart Getty be moved. However, the claimant did not return to work.

137. On our findings, this was one isolated incident of harassment, from a lower ranked employee which was appropriately dealt with by the claimant's managers. The Tribunal does not consider that this amounted to, or should be considered to contribute to, a fundamental breach of trust and confidence by the respondent entitling the claimant to resign.

138. The Tribunal has found that there was a breach of contract due to the operation of the equality clause. The claimant was paid substantially less than her varied contract provided. The Tribunal considers that this was a fundamental breach of contract that would entitle the claimant to resign without notice and is discriminatory. The Tribunal therefore has to consider whether this was the reason, or part of the reason for the claimant's resignation.

139. The claimant complains that Kevin McCafferty, when he met the claimant at her house, did not discuss the issue of her pay. She relies on this as a failure in the investigation.

140. However, the Tribunal looked at this slightly differently. The Tribunal considered it instructive to consider the conversation between the claimant and Mr McCafferty when he met her at her house to discuss her grievance. The claimant's focus was almost entirely on the unrealistic targets she was expected to achieve and a lack of training. She was also clearly exercised by the Stuart Getty comment. However, the Tribunal considers it significant that she did not mention at this meeting the issue of equal pay at all, even when

invited to say if there was anything that had been missed. She did ask for it to be added when she considered the terms of the minutes but it was far down the list of comments on a 2 page letter. It also formed a very insignificant part of her grounds of appeal.

141. The Tribunal considers that the claimant resigned because she found the job in terms of demands and working environment unsuitable for her. This included her concerns about not receiving proper training and Angela Horn's attitude. Some of those demands, in terms of excessive working hours and unachievable KPIs do appear to the Tribunal, on the evidence we heard, to be unreasonable and could potentially have been the basis of a breach of the term of trust and confidence. However, and importantly, they were not discriminatory factors.

142. The claimant was also aggrieved at the comment made by Stuart Getty but

we have found that that there was no breach of the implied term of trust and confidence in relation to the way that the respondent dealt with the comment.

1 43. The claimant may also have been disappointed in the way her grievance was investigated (and the outcome) but the Tribunal has found that this was not discrimination or harassment

1 44. Having carefully considered the evidence, the Tribunal does not consider that that failure by the respondent to provide equal pay with James Haldane-Dorrian was a factor in the claimant's decision to resign. She was not constructively dismissed in relation to that breach.

145. We conclude that, if there was a constructive dismissal, it was not discriminatory.

Remedy

146. The claimant's contract is varied so that her salary was £30000. The respondent is in breach of contract as the claimant was paid less than the varied amount. According to the schedule of loss provided on the last day of the hearing, the underpayment amounts to a net weekly underpayment of £68.43 and a total underpayment over the claimant's employment of £1231.74. The Tribunal accepts this calculation and awards £1231.74 as damages for breach of the equality clause. This is subject to interest at 8% from the midpoint of the period of discrimination.

147. In relation to the complaint of harassment, the Tribunal accepts that the claimant was genuinely upset by the comment of Stuart Getty and the implication that she was involved in, or interested in, having a relationship with Stephen Geoghan. The respondent took immediate and robust action against Mr Getty to make it clear that his comment was unacceptable. That is relevant to the objective consideration of whether there was a breach of the implied term of trust and confidence but will not remove liability for the respondent for a breach of the Equality Act.

148. The Tribunal is also conscious that the respondent cannot avoid liability for an unlawful act simply because a claimant is more upset by it than might be expected. However, the Tribunal has to consider the extent to which the accepted injury to feelings was caused by the discriminatory act or, if there are other factors, how much should be attributed to the discriminatory act.

149. Looked at in isolation, the claimant's reaction to the comment was extreme. The comment from Mr Getty was unjustified but the Tribunal considers it was part of a much bigger picture that was affecting the claimant's emotions and reactions. In particular, as noted above, the Tribunal considers that the claimant was struggling to cope with unrealistic targets and excessive working hours and felt she had not been properly trained or supported. The Tribunal is sympathetic to that position. She was also uncomfortable with the working environment . the Tribunal considers that this remark by Stuart Getty was a relatively small contributor to the emotional distress that the claimant was experiencing.

150. The Tribunal considers an award at the bottom of the lowest band of Vento scale is appropriate and awards £1000 for injury to feelings in relation to this comment.

151. That award is also subject to interest at 8% from date of the incident to the date of this judgment

Employment Judge: Susan Walker
Date of Judgment: 17 August 2021
Entered in register: 23 August 2021
and copied to parties