EMPLOYMENT TRIBUNALS

Claimant: **Mr C Coffey**

Respondent: **Coople (UK) Ltd**

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

On: **18 January 2023**

Before: **Employment Judge M Emery**

Representation

For the claimant: In person
For the respondent: Mr V Prati, Head of HR

JUDGMENT

The claim of harassment **succeeds**.

REMEDY JUDGMENT

The claimant is awarded the sum of **£2,500** for injury to feelings.

REASONS

1. Judgment and reasons were given at the hearing and written reasons were requested. These reasons expand on but do not materially differ from the reasons given at the hearing.

Issues

2. The hearing was listed to determine liability (whether the claim succeeds) and, if so, remedy (how much compensation should be awarded). It is a hearing under the Employment Tribunal Rules, Rule 21(2), because the respondent failed to submit a defence to the claim. The effect of Rule 21(2) is the respondent is only entitled to participate in the hearing to the extent I consider reasonable.

3. The issues to be determined are:

a. Did the claimant witness female employees being subject to sexual harassment on two occasions?

b. Did he complain about each of these incidents to the 3rd respondent?

c. Did being a witness to these acts amount to unwanted treatment related to his sex (a claim of sexual harassment)?

d. Was the failure to respond to or investigate his complaints an act of less favourable treatment because of his sex (a claim of direct sex discrimination)?

e. If (c) or (d) is yes, should compensation be awarded?

Bundle and witness evidence and process

4. The bundle was prepared by the claimant. Mr Coople provided a witness statement. There was no witness statement or evidence from the respondent. I asked questions of Mr Coople. Mr Prati made submissions on the evidence and the law.

5. This judgment does not recite all the evidence I heard, instead it confines its findings to the evidence relevant to the issues in this case.

6. This judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The facts

7. Mr Coffey described the incidents he had witnessed: in the first on 15 May 2021 a female manager was assaulted at the bar he had been placed by the respondent – *"a serious sexual assault".* A male member of staff *"aggressively groped"* her breasts in front of staff and potentially customers.

8. The 1st respondent, no longer in these proceedings, accepts that an incident occurred in which the manager's breasts were touched, but does not accept it as serious, that an investigation took place following the claimant's complaint about this incident. Mr Prati accepted in his arguments to the tribunal that the claimant was shocked by this incident, but does not accept that this conduct could amount to harassment based on the claimant's sex as it was conduct aimed towards a woman, a different sex.

9. The claimant submitted a complaint to Mr Prati; in it he describes the incident, he asks that the female member of staff's welfare be checked, he says that he found the incident *"offensive"* and that it upset and bothered him (29). The clamant says nothing was done, his complaint was acknowledged a month later, and after that he heard nothing further. In his acknowledgement dated 25 June 2021, Mr Prati says that they had been in contact with the brewery, the incident was being investigated. Mr Prati thanked the claimant for raising the issue *"… and commend your integrity and sense of responsibility. I understand it must have been distressing…"* (31).

10. The claimant says he witnessed another incident on 12 June 2021, he complained in writing on 17 June 2021 (30). In his evidence he described a female staff member being pinned to a chair in the restaurant, and an employee sat and *"gyrated"* on her. The manager was assaulted and, says the claimant, she *"reacted with outrage and anger"* . In his evidence the claimant described the conduct as *"an assault"* and *" absolutely unwanted behaviour",* she attempted to push the employee off *"as she was pinned – I could see her anger and her shouting get off".* He says in his grievance he found this incident offensive, he referred to Ms Sarah Everard's murder and women *"asking for awareness and action to feel safe I ask again for you to address the above…".* Mr Coffey says he heard nothing from the respondent on this complaint.

Submissions

11. Mr Coffey provided written submissions and also answered my questions and both parties were given an opportunity to seek legal advice on my questions. Mr Coffey provided a short statement after taking legal advice. Mr Prati answered my questions. I set out relevant arguments in my conclusions below

The Law

12. Equality Act 2010

s.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.

s.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.

…

(2) 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.

Relevant case law

13. We considered the cases provided by the respondents with their closing submission. We also considered the following general case law.

14. Direct Discrimination

a. Has the claimant been treated less favourably than a comparator would have been treated on the ground of his disability and (in relation to one allegation) on the ground of his race? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the disability / race (*Glasgow City Council v Zafar [1998] IRLR 36)*

b. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

c. The tribunal has to determine the *"reason why"* the claimant was treated as he was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ. 142). "*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of*." (Chondol v Liverpool CC UKEAT/0298/08)*

d. Was the claimant treated the way he was because of his disability, or because of his race? It is enough that his disability (or race) had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [disability] / [race]? Or was it for some other reason..?" *Nagarajan v London Regional Transport [1999] IRLR 572, HL*. "What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

e. *London Borough of Islington v Ladele*: *[2009] EWCA Civ. 1357* provides the following guidance:

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish

discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ. 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion, or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ. 32*, *[2007] IRLR 259* paragraphs 28–39.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

(7) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

f. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

15. Harassment

a. *Driskel v Peninsula Business Services Ltd [2000] IRLR 151*: Determining whether alleged harassment constitutes discrimination involves an objective assessment by the tribunal of all the facts; the claimant's subjective perception of the conduct in question must also be considered. The tribunal is therefore required to determine both the actual effect on the particular individual complainant and the question whether that was reasonable in the circumstances of the case. *Pemberton v Inwood [2018] EWCA Civ. 564*: "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))." This means that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

b. *Dhaliwal* : "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.'

c. 'Conduct': *'Prospects for People with Learning Difficulties v Harris UKEAT/0612/11*: suspension or other acts by an employer which would not normally constitute an act of harassment, can amount to acts of harassment; in this case the lack of forethought on the part of the employer and the peremptory nature of the suspension, with scant justification and absent prior consultation with the claimant, justified the tribunal's finding of unlawful harassment in this case.

d. Purpose or effect: Harassment will be unlawful if the conduct had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask,

however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

e. Related to the prohibited grounds: The conduct must be 'related to' a relevant protected characteristic, including conduct associated with that characteristic. The tribunal has to apply an objective test in determining whether the conduct complained of was 'related to' the protected characteristic in issue. *Hartley v Foreign and Commonwealth Office UKEAT/0033/15:* Where adverse comments were made by managers amount an employee, the fact that the intent of the managers was not to "aim" at her condition was irrelevant – the tribunal must assess *"if the overall effect was unwanted conduct related to her disability.'*

f. *Land Registry v Grant* [2011] EWCA Civ. 769: the tribunal must be careful not to cheapen the significance of the statutory wording; it must consider carefully whether the matters above can violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

Conclusions on the evidence and the law

16. On the issue of direct sex discrimination, the claimant says that the acts of the 3rd respondent – the failure to properly respond to him following the concerns he raised - amounts to less favourable treatment on grounds of his sex. He relies on a hypothetical female agency worker contracted through the respondent to provide work and who reported similar allegations of sexual misconduct.

17. Mr Prati responded to the first complaint, albeit after a month, he provided information and thanked the claimant in warm terms for raising the issue. No evidence was presented as to how Mr Prati would have reacted to a woman who complained.

18. But I did not accept Mr Coffey's argument that a woman who complained would have been treated more favourably and that the absence of any explanation from the respondent means that this is a proven fact. While no evidence was presented, I accept that it would be difficult generally for the 3rd respondent to get information from a 3rd party brewery on whose premises this incident took place. This would be the same for no matter the sex of the complainant.

19. The claimant has not shown that he was treated less favourably than a comparator would have been treated, and the claim for direct discrimination fails.

20. Harassment: I asked the parties for their comments, having given them an opportunity to take advice, on the case of *Brumfitt v Ministry of Defence* –where it was accepted that the claimant had been exposed to language that she found offensive, but she had not been exposed to this because she was a woman. The claimant argued that Guidance to the Equality Act, s.2.16 states that a white person can bring a claim of harassment if they witness conduct related to a protected characteristic directed at another worker – for example a black colleague being racially abused – both the white worker and their black colleague

could bring claims of harassment. The claimant argued that the conduct he witnessed was conduct of a sexual which was unwanted by him and by the staff members who were assaulted.

21. I noted also paragraph 7.9 of the ECHR's Code of Practice on Employment (2011), which states that the conduct in issue can include conduct related either to the complainant's own protected characteristic, or to a protected characteristic of other people.

22. I accepted that the claimant was upset and concerned at the incidents he had witnessed, and I accepted that this hurt met the definition of harassment as his dignity at work was violated by what he had seen. He told the managers he was working with amount what he had witnessed and he was sent home as he was so upset. The claimant perceived this conduct towards female colleagues, quite reasonably, as demeaning and derogatory conduct by employees who felt they could behave in this way get away with it.

23. I accept that this conduct meets the formal definition of harassment as the claimant was exposed by colleagues with whom he worked to conduct of a sexual nature towards fellow colleagues, which had the effect of violating his dignity at work. The claim of harassment against the respondent therefore succeeds.

Remedy

24. The claimant seeks an award for injury to feelings. He withdraws his claim for lost expenses and salary. He claims £12,000, on the basis that the injury he suffered following two incidents of discrimination merits a mid-band Vento award.

25. Prior to addressing the issue of compensation I adjourned the hearing for an hour to allow the parties to consider the Vento guidelines and the issues raised by the claimant at paragraph 12 – 16 of his statement.

26. I accepted that the claimant felt distress and upset – as he put it he was offended by the hostile conduct he witnessed.

27. The claimant argued that he should be awarded a 'middle-band' Vento award, a sum of £12,000 as he witnessed two acts of sexual assault which had a serious effect on him, *"from the point of witnessing the incidents and calling out this behaviour and complaining, it has nearly driven to suicide … the immediate impact led to everything going over in my head repeatedly with a sense of guilt, should I have done something more? I felt the powerlessness of being an agency worker and not being able to address this. No-one asked me if I was okay".* He has been to his GP but accepts he has provided no medical records.

Vento bands – remedy

28. Vento awards – Presidential Guidance 6 April 2021:

Lower band:	£900 - £9,100
Middle band:	£9,100 to £27,400
High band:	£27,400 - £45,600

29. I noted the following cases:

a. *G v E* (Case No 2900377/2008) (*14 March 2006, unreported*) — ITF £2,500: The claimant was sexually harassed by the daughter of the business owner over one night involving sexual touching and unwanted comments of a crude sexual nature.

b. *Loughlin v Broadgate Voice and Data Ltd* (Case No 3202133/18) *(28 January 2019, unreported)* — ITF £3,500: The claimant was subjected to derogatory remarks about her appearance. She found the remarks 'not very nice, extremely upsetting and hurtful'. The claimant was awarded £3,500; she was upset, humiliated and offended by the sexist and disablist remarks made to her in the workplace. Whilst there was more than one instance of discriminatory conduct towards her, it was found to fall in the midpoint of the lower band.

c. *Base Childrenswear Ltd v Otshudi [2020] IRLR 118*, the EAT held that in determining the amount of a Ventr award, the employment tribunal in each case must consider the particular effect on the individual claimant.

Remedy – conclusions on the law and evidence

30. I concluded that the claimant had not suffered a long-term condition and he had not had significant medical treatment as a result of what he had witnessed. I accepted that he did suffer feelings of shock, and afterwards he questioned his own actions, that he felt powerless and felt symptoms of depression. I considered the case law, noting that there were two unconnected incidents witnessed by the claimant at different venues, that the claimant was shocked and shaken by what he had witnessed. I considered that while the incidents were serious, he was a bystander rather than the principal victim of the assaults. I accepted that he struggled with his health for a period after but there was no lasting effect on him.

31. Bearing all the above in mind, I concluded that an award in the lower Vento band was merited. I concluded that the injury and alarm suffered were not trivial, however noting the case law they were not so significant to merit an award at the upper end of the lower band.

32. I concluded and that an award should be made for injury to feelings of £2,500.

Employment Judge M Emery
Date: 30 May 2023