EMPLOYMENT TRIBUNALS

Claimant: **Miss A Tubby**

Respondent: **Hills Park Veterinary Group Ltd.**

Heard at: **East London Hearing Centre**

On: **3, 4 and 5 May 2023**

Before: **Employment Judge Ross**
Members: **Mr K Rose**
Mr S Woodhouse

Representations:
Claimant: Mr N Clarke, Counsel
Respondent: Ms J Letts, Consultant

JUDGMENT

The Judgment of the Tribunal is that:-

1. The complaints against each Respondent of harassment related to sex contrary to section 26(1) Equality Act 2010 ("EQA") are upheld in respect of the incidents set out in issues 1.1, 1.2, 1.3, and 1.4(ii) of the List of Issues at Appendix A of this Judgment.

2. The complaint against each Respondent of harassment contrary to section 26(1) Equality Act 2010 is dismissed in respect of the incidents set out in issues 1.4(i) and 1.5(i)-(iii) of the List of Issues.

3. The complaints against each Respondent of harassment by unwanted conduct of a sexual nature contrary to section 26(2) EQA are upheld in respect of the incidents set out at 1.1, 1.2, 1.3(i) and 1.3(iii) of the List of Issues.

4. The complaint against each Respondent of harassment by unwanted conduct of a sexual nature contrary to section 26(2) EQA are dismissed in respect of the use of the term “little one” set out at 1.3(ii) of the List of Issues.

5. The complaints against each Respondent of harassment contrary to section 26(3)(c) EQA are dismissed.

6. The Claimant’s constructive dismissal was an act of harassment related to sex contrary to section 26(1) EQA and an act of direct sex discrimination contrary to section 13 EQA.

7. Save as set out above, the complaints against each Respondent of direct sex discrimination are dismissed.

8. The Claimant was unfairly dismissed by the First Respondent.

9. The First Respondent fundamentally breached the Claimant’s contract of employment and she was wrongfully dismissed.

REASONS

Complaints and Issues

1. The Claimant was continuously employed by the First Respondent as a receptionist at a veterinary surgery from February 2013 until her resignation on 12 April 2021. The Claim form was presented on 27 July 2021, after a period of Early Conciliation between 19 May and 30 June 2021 in respect of the First Respondent and 10 May to 21 June 2021 in respect of the Second Respondent.

2. The Claimant’s complaints were as follows:

2.1 Harassment related to sex under section 26(1) Equality Act 2010.

2.2 Harassment by unwanted conduct of a sexual nature (section 26(2) EQA).

2.3 Rejection of sexual advances harassment (section 26(3)(c) EQA).

2.4 Direct sex discrimination (section 13 EQA).

2.5 Constructive dismissal (with the dismissal alleged to be an act of harassment or direct sex discrimination).

2.6 Unfair dismissal.

2.7 Wrongful dismissal.

3. At the outset, the Tribunal explained to the parties that the time estimate of this hearing had been reduced by one day due to lack of judicial resource; and that the hearing would consider liability only. The parties agreed a draft list of issues at the Preliminary Hearing, which took place before EJ Lewis, who approved the draft list but noted that the ET hearing the case should decide the content of the final list of issues. Having had more opportunity to read into the case and the issues raised by the cases of the parties, and having had clarification of the issues at the outset of the hearing, the ET proposed an amended List of Issues, which was re-amended in one respect and then approved by the parties. The final List of Issues is at Appendix 1.

4. Ms. Letts accepted that if the factual allegations at issue 1 were proved, the Claimant had proved breach of the implied term of trust and confidence (but not that constructive dismissal had been proved).

5. Furthermore, the Respondents admitted that if the Claimant proved that she had been constructively dismissed, the dismissal was unfair.

The Evidence

6. There was an agreed bundle of documents. The page references in this set of Reasons refer to pages in the bundle.

7. The Tribunal pre-read the witness statements and then heard oral evidence from the following witnesses:

For the Claimant:

7.1 The Claimant;

7.2 Denise Newsome;

7.3 Tamara Stephenson;

For the Respondent:

7.4 Sharon Garnett, Practice Manager;

7.5 Michael Malone, Second Respondent.

8. In addition, the Tribunal read documents relevant to liability within the trial bundle.

9. We have set out in our findings of fact our assessment of the key witnesses' evidence on particular factual issues. Before reaching our findings of fact, we took into account all the evidence and submissions. The submissions focussed primarily on whose evidence should be preferred and why.

10. In reaching our findings of fact, the Tribunal directed itself that the demeanour of a witness – how they appeared when giving evidence – was

generally a poor guide to assessment of their reliability as a witness. An honest witness may be mistaken; and a dishonest witness may be skilled at constructing evidence which appears to be credible. We reminded ourselves that memory is fallible, and is often reconstructive. In addition, the events set out below began in 2013, and included incidents in 2019 and February and April 2021; and we took into account that memory was likely to fade over time.

11. We reminded ourselves, also, that the witnesses in this case were not expert or professional witnesses, and that they were giving evidence by video; we took into account during the hearing that they might need assistance, such as if there was any doubt about questions asked, so questions were repeated and breaks taken as and when necessary or as requested.

12. In addition, the Tribunal reminded itself that it was not investigating whether professional conduct standards were observed within the vetinerary practice, nor deciding how often the Second Respondent consumed alcohol and whether or how often he became intoxicated when he did so.

13. The Tribunal took into account the evidence of Ms. Newsome and Ms. Stevenson. They could give no direct evidence of the incidents which lay at the heart of this case. Their evidence included hearsay evidence about what they were told by the Claimant and what they observed of the Claimant. The Tribunal attached little weight to their evidence, because they could give no direct evidence about the incidents or the practices within the workplace; and, if the Claimant was mistaken about events, their evidence would contain those mistakes.

14. There were two unusual features to the hearing. First, although the parties had been informed by a Notice of Hearing dated 10 February 2022 that the final hearing would be a video hearing, on the first day of the hearing, the Respondents failed to arrange to attend at an office or room with a good internet connection. When Mrs. Garnett's evidence was heard (2pm on 3 May 2023), there were frequent episodes of freezing and some disconnections. At each point, the hearing stopped, until the Respondents were re-connected or the freezing ended. The Tribunal explained that it was incumbent on the Respondents to find a suitable room with a reliable connection in order to further the overriding objective and ensure a fair hearing.

15. At the conclusion of the evidence of Ms. Garnett, the Tribunal adjourned to consider whether to commence the evidence of Mr. Malone. It decided not to, until the Respondent's representative had taken instructions on where he would give evidence and whether it had a reliable connection; there could not be a fair hearing for either party unless the trial process could continue in the normal way, with cross examination and the witness responding. The Tribunal explained that in the alternative to a stable connection, the hearing would need to be converted to a face-to-face hearing in order to further the overriding objective. After the adjournment, Ms. Letts explained that the Respondents had been connecting by hotspot only, which meant the signal was poor; but the Respondents had now moved to a place nearer to the Wifi router and would continue from there for the evidence of Mr. Malone. This problem of

connectivity was not present on the second day of evidence, when Mr. Malone gave his evidence uninterrupted.

16. The second unusual feature was that, when Ms. Garnett commenced her evidence, she was in what appeared to be a fairly small room with Mr. Malone. When asked whether she wished to swear on a holy book, or to affirm, she paused, whereupon Mr. Malone prompted her to say she would affirm. At that point, the Employment Judge explained that now the witness was giving evidence, he could not say anything to her and should remain quiet. It was suggested that he moved to the back of the room, to sit behind the witness, which he did.

17. When the next question was asked, Mr. Malone again prompted Ms. Garnett before she could complete her answer. The Tribunal decided that Mr. Malone would need to leave the room where Ms. Garnett was giving her evidence, explaining that he could go to another room and join the hearing from there. There was a short adjournment to allow this to happen. However, the Second Respondent did not re-join; the Tribunal were informed that there was no other available room and that he was content for the hearing to proceed.

Findings of Fact

18. The First Respondent is a veterinary practice with two surgeries. The Claimant worked at the practice at 1 Lindfield Road, Romford. The premises had formerly been two houses. The Second Respondent bought the first in 1985, and converted it, into the surgery on the ground floor and a residential flat above. He moved back to live there in 2020.

19. At all material times, the flat contained the office, a main bedroom, bathroom and a spare bedroom which doubled as a stockroom. The Second Respondent considered that the premises were primarily his home, and secondly a workplace. He accepted that the line between the residential part and the surgery was blurred at the relevant times, with staff going upstairs such as to the kitchen or stockroom, and the Second Respondent going down to, or walking through, the surgery premises even when on his days off.

The Claimant's role and the workplace

20. The Claimant sets out her key colleagues and her duties in paragraphs 5-6 of her witness statement.

21. The administration and nursing staff at the practice were mostly female; the vets were male (with the exception of Winni Schiele).

22. Around 6 weeks after starting work, the Claimant's partner became seriously ill. He was placed in intensive care for 1 month or so. The Claimant was absent from work for 6-8 weeks providing care. She was very grateful to the Respondents for keeping her job open for her; she felt that she owed them something, a feeling which continued over her employment because her employer was good in respect of allowing time off for caring responsibilities.

23. The Second Respondent described the Claimant as able to deal with a busy waiting room and a variety of clients. He described her as being indomitable and that she could "*punch above her weight*", by which he meant that although she was much shorter than him, she could manage clients well. The Claimant is about 4 feet 11 inches tall.

24. The Practice Manager was Ms. Garnett who has worked with the Second Respondent for more than 30 years and is the Company Secretary of the First Respondent.

The incidents

25. In August 2013, the Claimant had to get some stock and stationery from the spare room in the flat. The room had a double bed in it as well as stock.

26. Whilst the Claimant was present, the Respondent came into the room, lay on the bed and started to talk to the Claimant. The content of that conversation and the events which took place are set out in paragraph 10 – 13 of the Claimant's witness statement, which we accepted. Although the incident was 10 years ago, the Claimant gave clear and consistent evidence in cross examination. The Claimant felt uncomfortable because of the Respondent's actions, which included asking questions about her relationship with her partner and how they were getting on. The Second Respondent did not deny that the incident could have happened; but he said that he would not put any woman in a difficult position or where they felt uncomfortable, but that it would be for the Tribunal to decide whether she felt uncomfortable.

27. The Tribunal found that the conduct of the Second Respondent on this occasion was unwanted. This is evidenced by her reporting the incident to two nurses downstairs and to Ms Garnett; and the fact that Ms. Garnett had shouted out (from a nearby room) to the Second Respondent that he should get out and leave the Claimant alone. Ms. Garnett told the Claimant that she would follow it up, but nothing followed, so the Claimant just left it at that.

28. Moreover, the Claimant recalled the incident clearly despite the passage of time, stating she had never been made to feel like that in any job. But the Claimant did not resign because of this incident, because she felt gratitude to the Respondents for keeping her job open whilst she was caring for her partner.

29. Although not one of the complaints within the Claim, this incident is one of the primary facts forming the background to the complaints. The Tribunal considered it relevant to consider whether this conducted related to the sex of the Claimant. We found that it did relate to her sex; the Second Respondent would not act in the same way with a male colleague.

The use of names and physical contact

30. The Second Respondent accepted that he called the Claimant "*blondie*" and "*little one*". When asked in cross-examination whether he called her "blondie", he replied "*not necessarily*" and proceeded to give a long answer, which contained irrelevant matters. When asked again by the Employment

Judge, he stated that he did, but that he called other nurses "blondie" as well, because it was easier to call out "*blondie*" when in a room and he needed help. In respect of the term "little one", he said that this was because the Claimant was a small person but one who could take control of a busy room of clients. He denied using these terms in a derogatory manner and he had no idea of her perception.

31. It was put to the Claimant in cross-examination that the Second Respondent gave other staff members nicknames. The Claimant accepted that he called another female staff member "blondie" but that no male members of staff were given such names. She said that they were referred to by their first name.

32. The Second Respondent could not identify names or terms that he gave to male staff members (other than his sons, whom he claimed he referred to as Son 1, Son 2 and so on) which did not include their surname or a large part of it. For example, in respect of Mr. Blaj, the name the Second Respondent used was an obvious derivation of that name.

33. The Second Respondent was asked whether he referred to male staff members by their hair colour. His answer was evasive, saying that he could not say if he did or not.

34. The Tribunal preferred the Claimant's evidence on the factual issues at issues 1.3(i)-(ii). We found that her evidence was clear and consistent, given without any hesitation, and to a large extent corroborated by the Second Respondent's own admissions.

35. The Tribunal found that the names given to the Claimant were not nicknames as that term is understood by the Tribunal, in that they were not names that were shortened or varied in form and used amongst a group of contemporaries with consent.

36. The terms used by the Second Respondent to refer to the Claimant were like labels. We found that they were belittling and patronising.

37. The term "blondie" was applied to more than one female employee who was blonde, but that only magnified its effect, because it diminished the Claimant's dignity as an individual. The term "blondie" referred to the physical appearance of the Claimant – her hair colour. The Tribunal found this label was shorthand for a woman who was attractive in a sexual context. The use of this term was unwanted.

38. In respect of the term "little one", the Second Respondent's evidence was expressly, or by inference, that it was less usual for shorter people to be able to manage other people in receptionist duties. Apart from finding that this sought to justify words which were unwanted by the recipient employee, the Tribunal found that the use of this term pointed to the Second Respondent being bigger; and the tenor of the Second Respondent's evidence was that a bigger person could, all things being equal, do a better job in reception. The Tribunal found that the use of this term diminished the Claimant, and that this

term would not have been used if the Claimant had been male.

39. It is true that the Claimant did not complain about the use of these terms; but we find that she put up with their use, not that she consented to them. We found it was likely that she put up with their use because she valued the support that she received from her employer in the context of taking time off to assist in care for her partner.

40. This is one example of the Second Respondent not having any insight into the effect of the words that he used on the Claimant and other female members of staff.

41. The Claimant was cross-examined on the basis that there were no incidents from 2013 to 2019. We accepted the Claimant's evidence in response, which was consistent with her witness statement and other parts of her evidence. The Second Respondent put his arm around her frequently, pulling her towards him. She pushed away from him and would tell him to get off. He would laugh in response. She found his actions in this respect intimidating because he was a man over six feet tall. We found that these actions by the Second Respondent were unwanted.

42. Moreover, there were many other incidents. We accepted the Claimant's evidence that she could not remember the dates, and that these in the Claim were the main ones.

43. The Tribunal found that the words used and the physical touching described by the Claimant were related to her sex. There was no evidence that a male employee would have been treated in this way; and we found that a male staff member would not have been so treated.

July 2019

44. In respect of this incident, we found that the Claimant was a clear and consistent witness. She gave a detailed account of events, and was unshaken in cross examination. Moreover, her account of the Second Respondent having drunk excess alcohol was consistent with several other pieces of evidence (such as the text messages from Winni Schiele at p.140-141); and the Claimant was a former publican, experienced in recognising whether a person had drunk an excessive amount of alcohol. The fact that the Second Respondent had drunk excessive alcohol on this occasion tended to support her evidence of what he said and did, in that we found he was likely to be less inhibited.

45. The Tribunal found that one afternoon, the Claimant went into the prep room to speak to Winni Schiele about an enquiry. She saw the Second Respondent was there and that he was visibly drunk and swaying a bit. He began saying things to the Claimant, including "*Cor, what I would do with you*", and "*Let's go upstairs and make some magic*", and kept trying to grab the Claimant, who pushed him away.

46. There was no evidence about grunting noises (which is not in the Claim form nor in the Claimant's statement), so we found this allegation in the list of

issues was not proved.

47. We accepted that this incident occurred on one of the days that the Second Respondent had taken off work. In evidence, he said that he sometimes went for a meal with alcohol at lunchtime on his days off. We found that it was likely that he had done that, but drunk to excess, and called in to see Winni Schiele on his way back to the flat.

48. We found that the Claimant did complain about this incident to Ms. Garnett, because she could not believe it and because it was unwanted. Ms. Garnett's response was that she would speak to him when sober, that she looked at him like a brother but that he was a "*nightmare*", and that he was owner and could do what he wants.

49. In respect of the evidence of Ms. Garnett, having seen and heard her evidence, we found that she felt a strong sense of loyalty to the Second Respondent, which coloured her evidence, and made her unable to accept key aspects of the Claimant's case. For example, when asked in cross-examination whether she had described the Second Respondent as like a brother, she did not give a direct answer, and initially resisted that suggestion; then she said that she may have referred to him as like an uncle; and eventually she accepted that she might have said to the Claimant that he was like a brother to her.

50. We found Ms. Garnett was not a reliable witness. She was guarded in her responses and from time to time, on important points, avoided giving a direct answer. For example, when asked if there had been any complaints, whether formal or informal, about the Second Respondent's conduct, there was a very long pause – which was nothing to do with the screen freezing – and then she said another staff member had been upset to find a performance review document about her performance. The Tribunal found this answer unreliable; there was no need to delay if it were an accurate recollection. Again, when asked if the Second Respondent was ever drunk on the business premises, she said that she could not say, because she did not have a breathalyser; but that he had a bottle of wine sometimes when not working. Her evidence about whether the Second Respondent was in the surgery when he had visibly consumed excess alcohol was not reliable when set next to the evidence of the Claimant which was corroborated by the messages of Winni Schiele at p.140-141.

51. The Second Respondent denied the incident in July 2019. He suggested that Winni Schiele's messages were sent because she was merely supporting a wounded colleague who was upset and that she had worked for him for 10 years and planned to work another 10 years. We found it unlikely that the comments made by Ms Schiele were either made up or that they were platitudes. It was all the more unlikely that they were made up if Ms. Schiele was happy in the practice, because there was no need for her to say such things about the vet who owns the practice where she intended to stay.

52. The Respondent said in oral evidence that he did not sway, but that he had had bilateral hip replacements in about 2011, which were successful, but that his gait now had more of a swaying motion. The Tribunal accepted this; but

we did not accept that this explained the swaying that the Claimant observed in the prep room, nor did we accept that the Claimant (as a former publican) had failed to distinguish the Second Respondent's gait (which she saw almost every day at work) from the swaying motion which often results from the consumption of excess alcohol.

53. We found that it was likely that the Second Respondent could not remember the incident because he was intoxicated at the time.

Late February 2021

54. The Claimant's partner had had a serious medical condition. It was not disputed that in about late February 2021, he had come out of hospital, following major surgery. The Second Respondent admitted that there was a conversation with the Claimant in which he asked about the health of her partner, whom he had met a few times over the years. The Claimant told him that her partner was doing well.

55. The Claimant's evidence was that the Second Respondent responded "*Oh! That's a shame, I was hoping to get in there*"; then he laughed and walked away. The Claimant was shocked.

56. The Second Respondent's oral evidence was that the suggestion that he used such words was "*rubbish*"; and that he had said that if she needed anything, she should ask.

57. There was no direct evidence to corroborate the Claimant's account, although she told the nurses immediately after the event. The Tribunal took into account that the Claimant's emotions were probably fairly raw at the time, given her partner's recent surgery and his health, and we considered whether in those circumstances, her memory was likely to be reliable.

58. Having considered all the evidence, we preferred the Claimant's account of events. In cross examination, it was put to the Claimant that there was no other incident between 2019 and late February 2021, with the suggestion that she was not correct in her recollection; but the Claimant explained that the Second Respondent always said unwanted stuff with a sexual reference, and that her statement only contained the main incidents. The Claimant was candid in admitting that she did not know the dates of the other incidents. It was not put to the Claimant in cross-examination that she was lying about this incident.

59. The Tribunal found that her evidence had the ring of truth to it. It was consistent with the other evidence that she gave. Moreover, we had the benefit of seeing the Second Respondent give oral evidence. We found that he made statements with no concern for the consequences, such as when he complained that questions put by Counsel (about evidence in the WhatsApp messages which suggested he had been intoxicated in the business premises) were racist. When the Employment Judge asked what was the basis for such a serious allegation, he withdrew it and commended Mr. Clarke for doing his job competently. We concluded that he made the alleged comment in February 2021, and thought it was humorous.

60. At the time that the comment was made, the Claimant was likely to have been sensitive to her partner's state of health. As the Second Respondent accepted, he had had major surgery, and moving towards the end of his life.

61. The comment was unwanted and it related to the Claimant's sex; it would not have been said to a male staff member in the same position. The Claimant was not over-sensitive; in the circumstances, it was inevitable that a comment like this would cause real hurt to the Claimant.

3 April 2021

62. On 3 April 2021, around 8.30am, a client of the surgery telephoned about her sick dog, demanding medication. She was abusive to another staff member; and then to a further staff member in her next call, who slammed the phone down. The phone rang again and the Claimant answered. The swearing and abuse continued, and the Claimant ended the call. The client continued to call; in the last call, the Claimant was called a "*shit cunt*", so she put the phone down and told the registered vet nurse, who went upstairs to see the Second Respondent to complain to him. He agreed to see the client later than day. He made this decision because she was a client of the practice; and this decision was not related to the Claimant's sex nor did it amount to any form of harassment.

63. It was admitted by the Respondents that the client had used the words alleged. It was also admitted that the Second Respondent agreed to have a consultation with the client that day, the inference from the evidence of both parties being that it was provided free of charge. There was a dispute of fact over the time of the consultation; but the Tribunal did not find the precise time to be material.

64. The Claimant's evidence (witness statement paragraph 29-32) was that she thought the Second Respondent would ban the client from the practice. When the client turned up for the medication, the Second Respondent came down from his flat and asked what the woman's name was. The Claimant said: "*What? The one that called me a shit cunt?*" The Second Respondent replied "*Well you are one, aren't you*?". The Claimant was shocked, and said that if that was what he thought of her, she would leave. He took the medication, laughed and walked out of the building to where the client was waiting.

65. The Tribunal preferred the Claimant's evidence to that of the Respondent on this issue, which we found to be clear, consistent and detailed. In addition, there was corroboration in the form of documentary evidence. First, the letter of resignation at p.126 explains that the Claimant cannot work for "*a drunk and abusive boss who shows no respect for myself or my colleagues*". Secondly, the WhatsApp messages from the Claimant sent shortly after the incident refer to what the Second Respondent had said. For example, on 8 April at 1849, the Claimant referred to what had been said to her; and the response of the registered vet nurse did not question that nor did it suggest that it was a new revelation; in fact, the nurse responded: "*I don't blame you, he has been bang out of order* …" In a further example, the Claimant stated that she does not want to work for an abusive boss.

66. Furthermore, it was not suggested in cross-examination of the Claimant that she was mistaken because she misheard or was too angry to hear, nor that she was lying. It was not put to her that she had asked the Second Respondent to ban the client nor that the Claimant was shaking with anger.

67. The Second Respondent's oral evidence was inconsistent with his witness statement and the Grounds of Resistance. In oral evidence, he stated that the Claimant was shaking with anger and had stated that she wanted the woman barred, at precisely the moment that he asked what her name was and was going out to see the client. The Second Respondent stated that the Claimant must have misheard him, and that he had an Irish accent and had lost 6 teeth that year. The Tribunal found that, if the Second Respondent had an accurate recollection of events, these points would have been included in his witness statement at least.

68. It was put to the Second Respondent that his remark to the Claimant on 3 April 2021 was a flippant one. He denied that he ever made flippant remarks. However, having seen him give oral evidence, and make a number of remarks that could be described as being made flippantly, we found that evidence unreliable.

69. The Tribunal found that the Respondent had, in making the remark, in effect adopted the abusive term used by the client. This was unwanted by the Claimant. The term used was abusive. The Claimant was very upset by it and by the lack of any apology. She went home at about 1.30pm.

70. The Claimant attended work on 5 April 2021, hoping the Second Respondent would apologise. He did not do so.

71. The Claimant was then on annual leave on 6 and 7 April 2021, before returning to work on 8 April 2021. The Claimant was not scheduled to work on 9, 10 and 11 April 2021.

8 April 2021

72. The Claimant attended work at 8am and was hoping the Second Respondent would apologise for the incident on 3 April. A Nursing Assistant was also present.

73. The Second Respondent came down from his flat in his dressing gown. He said words to the effect of "*Ladies, ladies come here, I've got something to show you"*. The Claimant thought he would apologise.

74. The Second Respondent accepted that he had a mobile phone in his hand, and wanted to show them a video of a child singing, which he found particularly engaging.

75. The Claimant's evidence about the incident was as follows. She could not believe that he was not going to apologise, stated that she did not have time for this, and went back to reception. The Second Respondent said "*I don't expect nothing less from you*". The Claimant burst out crying when she was

back at reception and left work.

76. The Second Respondent did not have any recollection of making the statement above. His evidence was that he told the staff that the boss would not tell them off for watching. He admitted that he did show videos and sometimes get in the way of staff at the surgery by doing such things.

77. Having heard and seen the witnesses give evidence, the Tribunal found that it was likely that the Second Respondent had made the comment alleged. The Claimant had demonstrated that she was a generally reliable witness. The Respondent had demonstrated that he was someone who made statements without considering the consequences; and, perhaps for that reason, he did not advance a positive case that the words alleged were not said.

78. However, the Tribunal found that the events in issue 1.5 and the words set out in issue 1.5(iii) were not related to the Claimant's sex. We found that Second Respondent used the words because he was unhappy that the Claimant did not want to share the experience of watching the video with him. We have found that Second Respondent was likely to have said the same thing in the same circumstances to a male employee, where he was unhappy with the employee's rejection of the opportunity to share in his amusement.

The Claimant's resignation

79. On Monday 12 April 2021, the Claimant handed in her resignation letter, at p.121. The Tribunal found that the reason she resigned was due to the comment made by the Second Respondent ("*well you are one, aren't you?*") made on 3 April 2021, coupled with the lack of any apology.

80. The Respondents submitted that the Claimant resigned so that she could care for her partner. The Claimant denied this.

81. The Tribunal accepted the Claimant's evidence about why she resigned. The client had used a female genitalia-specific term, which the Second Respondent had adopted; the Claimant had found the words used offensive and unwanted; and for which the Second Respondent failed to apologise. Furthermore, the documentary evidence created at the time corroborated the Claimant's evidence: the Claimant explained in her messages to her former colleagues at the time that she loved her job; and in her resignation letter states that she was "*forced*" to take that step by the actions of the Second Respondent.

82. The Tribunal found that the fact that her partner was very ill was most unlikely to be the reason - or even a reason – for the Claimant's resignation at that point in time. The Respondents had been supportive of the Claimant, enabling her to take time off to provide care to her partner when he was ill; and a fair inference from the WhatsApp messages was that she received support from colleagues and from performing her role at work (see for example her exchange with Ms. Garnett at p.134, in which the Claimant describes herself as "*gutted*" to be leaving).

83. In his evidence, the Second Respondent alleged that this Claim was because the Claimant was at the end of her tether (by inference, he meant due to her partner's declining health) and that the incidents in April 2021 provided a perfect opportunity for her to run away and stick in a claim for unfair dismissal; and that she had a monetary incentive, because the Second Respondent was a fat crow ready to be picked. The Tribunal heard and saw no evidence to support such allegations. We found that the Claimant was not motivated by any monetary consideration in resigning and bringing this Claim. The evidence pointed to her enjoying her job and being "*gutted*" because she felt that she was forced to resign and leave. We found that the evidence of the Second Respondent in this respect was insulting and demeaning.

84. The Claimant was cross-examined about paragraph 68 of her witness statement and comments in the messages, which stated that the Second Respondent was disrespectful to everyone. The Claimant gave a clear answer: he was disrespectful to everyone, but mainly to her. Although not in her witness statement, the Tribunal accepted her oral evidence that the Second Respondent was never disrespectful to a man. We accepted her evidence that when she stated he was disrespectful to everyone, she meant all the women at the practice, because it consisted mostly of female employees.

Lack of complaints

85. It was part of the Respondents' case that the Claimant's evidence could not be reliable, because it was inconsistent with key pieces of evidence, which were that she had never made a formal complaint and never raised a grievance, despite being provided with a copy of the First Respondent's handbook when she commenced work.

86. The Claimant's evidence was that, in effect, complaints were made by herself and other staff, but that they were swept under the carpet. The Claimant explained that informal complaints had been made, not just by her. Ms. Garnett's perception was that the Second Respondent was the boss, so nothing could be done. Having seen her give evidence, and found that she considered him like an uncle or brother, we found that it was likely that she had said that to the Claimant and that she would not take formal action about the Second Respondent's conduct, but try to work out an informal fix for any problem his actions created. For example, in this case, despite what was reportedly said to the Claimant on 3 April 2021, her proposal was that the Claimant transfer to the sister practice, not that her complaint about what had happened should be investigated fully and action taken, despite the provisions in the handbook which categorised discrimination, harassment, offensive language and offensive behaviour as gross misconduct.

87. Having considered the evidence as a whole, the Tribunal noted that the Respondents' practice had developed in an organic and informal way, and there was no formal HR officer, although the practice retained HR Consultants. The lack of reliance on formal process was evidenced by the lack of any formal investigation at all about the incident on 3 April 2021, even though it led to the resignation of a staff member who had worked there for several years, loved

her job, and even though Ms. Garnett sought to retain her within the First Respondent's employment. In that context, the Tribunal attached very little weight to the lack of any formal grievance or formal complaint. Given the character of the Claimant, as described by the Second Respondent, we considered that it was likely that she had decided to continue to work for the Respondents in spite of the unwanted actions of the Second Respondent which we have set out above, until the incident on 3 April 2021 and the lack of apology. This offended and upset her to such an extent that she decided she could not tolerate his behaviour any further.

Law and submissions

88. Counsel informed the Tribunal that the law was agreed, but neither party produced any agreed outline of the law nor properly explained what was agreed. This was not helpful. As a result, the Tribunal directed itself to the relevant law, which is summarised in Appendix B to this set of Reasons.

89. Although the Tribunal took into account the burden of proof provisions within section 136 EQA, it is important not to make too much of the role of those provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where, as in this case, the Tribunal is in a position to make positive findings on the evidence one way or the other: Hewage v Grampian Health Board [2013] UKSC 37.

90. The parties made oral submissions. It is not necessary nor proportionate to repeat them here. We have indicated certain submissions made by the parties in the course of this set of Reasons, and why they were rejected or accepted.

91. Ms. Letts referred to South Western NHS Ambulance Trust v King [2020] IRLR 168, which we consider below.

Conclusions

92. Having applied the above findings of fact and the law to the issues in Appendix A, the Tribunal reached the following conclusions.

Issue 13: Jurisdiction

93. The Tribunal directed itself to section 123 EQA. The Tribunal directed itself to consider whether the acts complained of in July 2019 and February 2021, together with the frequent use of the names referred to and the unwanted physical contact, were part of a continuing act, or one-off events with continuing consequences.

94. The Tribunal applied Metropolitan Police Commissioner v Hendricks [2003] ICR 530 and the guidance set out there at paragraphs 47-52.

95. The Tribunal considered the substance of the complaints. This was that the employer was responsible for an ongoing situation or a continuing state of

affairs in which female employees, particularly the Claimant, were subject to unwanted treatment by the Second Respondent which amounted to harassment related to sex or sexual harassment, and that female employees were treated less favourably than male employees. This consisted of unwanted names and unwanted remarks directed to the Claimant such as those in issues 1.1 and 1.1 and unwanted physical contact, such as explained in 1.1(ii) and 1.3(iii). The evidence of the Claimant, which we accepted, showed in particular that the Second Respondent was likely to have made demeaning comments to the Claimant and probably other female staff members (at least by use of the term "blondie") over a long period or spoken to them in a way likely to humiliate or violate their dignity.

96. The Tribunal found that the actions of the Second Respondent did create an intimidating, offensive and humiliating environment – even if he failed to realise this and even though he gave no thought to the impact of his words and actions on the Claimant and the female nursing and administration staff. We accepted the Claimant's evidence that the reason female staff members remained was that they had bills and mortgages to pay. The Respondents were reasonable or good employers in other ways, paying bonuses and allowing time off for caring responsibilities.

97. The continuing state of affairs – which the Tribunal found to be part of the culture of the Claimant's workplace - is evidenced by the facts found above; for example, see our findings of fact, particularly those set out at paragraphs 30-43. Furthermore, this state of affairs can be inferred from other evidence, including the statements of another female employee, Ms. Schiele. On 9 April 2021, Ms. Schiele sent a WhatsApp message to see if the Claimant was coming back to work. This included: "*I can understand if not – the way he's acting atm is an absolute joke …".* The Applicant stated that she did not intend to return to work, whereupon Ms. Schiele responded*: "Fair enough. Its getting a bit ridiculous with him. Rory had to physical drag him away today as he wouldn't leave me alone. Thank God I didn't understand what he was saying as he was so drunk…He's probably worse with you guys. He has said stuff to me but never that bad so completely understand."* (Rory is one of the Second Respondent's sons). Also, on the same date, another member staff, Kim, messaged as follows: "*I was there today and he is a nightmare isn't he…*" ("he" by inference must refer to the Second Respondent).

98. Having taken into account all the evidence and submissions, the Tribunal concluded that there was "an act extending over a period" as distinct from a succession of unconnected isolated specific acts. To explain this further, although the Claimant relied on separate acts of harassment, they were linked to one another and linked also to the language and conduct displayed by the Second Respondent to other female staff members by the culture that we have found existed, which was a continuing state of affairs.

99. In South Western NHS Ambulance Trust v King, the facts were very different from those in the present case, not least because no allegations of discrimination within the primary limitation period were found to have occurred, as a question of fact: see paragraphs 32-33. We accepted that a claimant cannot rely on some floating or overarching discriminatory state of affairs

without that state of affairs being anchored by specific acts of discrimination occurring over time. In the present case, the continuing state of affairs was anchored by specific proven facts.

Issue 2: Harassment related to sex

100. As we have found above, the proven acts at issues 1.1 to 1.4 were all unwanted by the Claimant.

101. The conduct of the Second Respondent was related to the sex of the Claimant. Our reasoning includes:

101.1. Incident 1.1 (despite the noise not being proved) and incident 1.2 contained, at least, sexual innuendo if not a direct request for or suggestion of sexual relations.

101.2. Incident 1.3 involves words and actions which relate to the Claimant's hair colour and size. We concluded these both related to her sex. The actions of putting his arm around the Claimant also related to her sex.

101.3. Incident 1.4(ii) amounted to the adoption of a female genitalia-specific term of abuse.

102. The Claimant has proved facts which led the Tribunal to conclude that the Respondents' conduct in respect of the proven acts within issues 1.1, 1.2, 1.3 and 1.4(ii) had the effect of violating the Claimant's dignity and creating a humiliating and offensive environment.

103. We concluded that, having viewed all the evidence objectively, it was reasonable for this conduct to have the proscribed effect on the Claimant set out in section 26(1)(b). The Claimant was, on the evidence, a fairly strong character. On the evidence, she had put up with a low or moderate level harassment in the use of names referring to physical characteristics, sexual references and unwanted touching over a long period. However, at the time of several of these incidents, the circumstances were that she was under pressure from outside work due to the ill-health of her partner. Moreover, the acts of the Second Respondent became more serious in 2021, culminating in him adopting an extremely offensive term which had been used towards the Claimant.

104. The Claimant's perception was that the incidents were unacceptable; and that the incident of 3 April 2021 was intolerable. This perception was reasonable in all the circumstances: it was reasonable for these incidents to have the effect of violating her dignity and causing her to feel humiliation and to be offended.

105. Accordingly, the Tribunal concluded that the incidents found by the Tribunal to have occurred which are referred to at issues 1.1, 1.2, 1.3 and 1.4(ii) amounted to unlawful harassment related to sex.

106. The incidents at 1.5 did occur. However, the words used by the Second Respondent at 1.5(iii) did not relate to the sex of the Claimant for reasons

explained in our findings of fact (paragraph 78).

Issue 3: Harassment - unwanted conduct of a sexual nature under section 26(2) EQA.

107. The incidents at issues 1.1 and 1.2 were both unwanted and of a sexual nature, being innuendo or requesting or proposing a sexual relationship.

108. For the reasons set out above, the Claimant had proved facts from which showed the Respondent's conduct had the proscribed effect and that it was reasonable for it to have that effect. The Second Respondent was, in effect, the "boss" of the practice, and in the July 2019 incident, he was proposing sexual relations with the Claimant during working time and within the same building.

109. In respect of the three types of conduct at 1.3(i) – (iii), the Tribunal considered paragraphs 7.12 to 7.13 of the EHRC Code of Practice which provide as follows:

7.12 Sexual harassment occurs when a person engages in unwanted conduct as defined in paragraph 7.6 and which is of a sexual nature.

7.13 Conduct 'of a sexual nature' can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature.

110. After careful consideration of the law and the statutory guidance, on a fine balance, the Tribunal concluded that the conduct involving the Second Respondent using the term "blondie" and putting his arm around the Claimant was conduct of a sexual nature.

111. Our reasons are as follows. The conduct of putting his arm around the Claimant was unwanted. It was an act that was suggestive of an existing intimate relationship – but the only relationship between the parties was that of employer and employee - and the conduct tended to show that the Second Respondent considered that there should or could be a sexual relationship; and the arm round embrace was a sign or symbol of this.

112. Moreover, this unwanted touching had to be seen in the context of an environment where the Second Respondent used the word "blondie" to refer to the Claimant. As we have explained, the Tribunal found this label was shorthand for a woman who was attractive in a sexual context.

113. The complaint under section 26(2) EQA in respect of the use of the term "little one" is dismissed.

114. Therefore, the complaints at issues 1.1, 1.2, 1.3(i) and (iii) were harassment by unwanted conduct of a sexual nature under section 26(2) EQA.

Issue 4: Rejection of sexual advances: section 26(3)(c) EQA

115. In respect of these complaints, the Tribunal found that the Second Respondent had engaged in acts related to the Claimant's sex, or of a sexual nature, such as unwanted touching by putting his arm around her and by making the comments in 1.1 and 1.2. As we have explained, we concluded these had the effect which is prohibited by the EQA, and that it was reasonable for them to do so.

116. In addition, the Tribunal concluded that the incidents at 1.4(ii) and 1.5(iii) amounted to less favourable treatment of the Claimant.

117. However, the Tribunal concluded that the complaints under section 26(3)(c) EQA should be dismissed for the following reasons.

118. First, the Tribunal has found that the comment at 1.5(iii) was made by the Second Respondent, but that this act was not related to the Claimant's sex. In addition, we concluded that the words used were not of a sexual nature.

119. Secondly, the Tribunal concluded that the comments made on 3 April and 8 April 2021 were not caused by the rejection of the unwanted touching, in the form of attempting to put his arm around the Claimant, and the words used in the incidents in July 2019 and February 2021, which suggested that the Second Respondent was making some form of sexual advances towards the Claimant. The Second Respondent used the words that he did on 3 and 8 April 2021 because he gave no thought to the consequences of what he said. There was no evidence that linked the words used on 3 and 8 April 2021 to the incidents of July 2019 or February 2021, nor to the incidents set out in paragraph 1.3. Accordingly, the Tribunal did not infer from the primary facts that the Respondent acted as he did on 3 and 8 April 2021 because of the Claimant's rejection of his earlier unwanted conduct.

120. Furthermore, as we indicated at paragraph 78 of our findings, the Second Respondent was likely to have said the same thing on 8 April 2021 to a male employee in the Claimant's position.

121. We concluded that the Claimant had not proved facts from which the Tribunal could conclude that the treatment was because of the Claimant's rejection of the sexual advances alleged to have been made by the Second Respondent.

122. Accordingly, these complaints shall be dismissed.

Issues 5 – 7: Direct sex discrimination

123. Given the above findings, there is no need for the Tribunal to determine the complaints of direct sex discrimination in respect of the conduct set out in issue 1 of the list of issues. This is because, as a result of the statutory provisions, once a complaint is found to be harassment, a claim of direct sex discrimination cannot succeed (save in respect of a complaint of dismissal).

124. For reasons set out in our findings of fact, the incidents at issue 1.4(i) and issue 1.5(i)-(iii) were not in any way caused by the Claimant's sex.

Issues 8 – 10: Constructive unfair dismissal

125. Having found the acts set out at issues 1.1 to 1.5 all proved, and that the acts at 1.1, 1.2, 1.3, and 1.4(ii) were acts of harassment, the Tribunal concluded that the First Respondent had breached the implied term of trust and confidence. Ms. Letts for the Respondents had conceded that this would be the case.

126. In any event, the Tribunal concluded that the Second Respondent's adoption or endorsement of the comment made by the client on 3 April 2021 was so serious – so offensive - that it amounted to a fundamental breach of contract in itself, particularly when coupled with the lack of any apology.

127. The Respondents alleged that the Claimant had affirmed the contract after the breach. The Tribunal rejected this argument. There is practically no evidence to support a finding of affirmation. The Claimant resigned within 9 days of the incident on 3 April 2021, during which she was only scheduled to work for 2 days, being 5 and 8 April 2021, and over which period she was hoping for an apology. The Claimant left work early on 8 April, following the comment at issue 1.5(iii) and no sign of an apology.

128. There is no evidence that, apart from attending work on 5 and 8 April 2021 (albeit she left almost immediately on 8 April), the Claimant did any act consistent with affirmation of the contract. The Tribunal concluded that two days of further work was sufficient to amount to affirmation in circumstances where the Claimant was hoping for an apology, and where she had to make the decision to leave a job that she loved, and which she had performed for several years.

Issue 11: Was dismissal an act of harassment or direct sex discrimination

129. The constructive dismissal of the Claimant was an act of harassment under section 26(1) EQA. The findings in respect of the incidents on July 2019, February 2021 and April 2021, plus the acts set out in issue 1.3, demonstrated that the breach of contract by the Respondent related to the Claimant's sex. In particular, the words used on 5 April 2021, as set out in 1.4(ii) related specifically to the Claimant's sex. We have also concluded that she resigned in response to that breach.

130. Insofar as it is necessary to do so, the Tribunal went on to consider whether the constructive dismissal was an act of direct sex discrimination. We decided, in the alternative, that it was less favourable treatment because of the Claimant's sex. In general, on the findings of fact above, the conduct of the Second Respondent towards the Claimant was because of her sex; a male receptionist would not have been treated in that way. Furthermore, the abusive term adopted by the Second Respondent when speaking to the Claimant on 3 April 2021 contained a crude reference to female genitalia, which the Tribunal considered would probably not have been adopted by the Second Respondent when speaking to a male receptionist.

Issue 12: Wrongful dismissal

131. The Claimant was constructively dismissed without notice. Her contract of employment provides for 4 weeks' notice: see p.58. The quantum of damages shall be assessed at the remedy hearing.

Remedy hearing

132. The provisional remedy hearing listed on 26 September 2023 shall now proceed, unless the parties can resolve questions of remedy without the assistance of the Tribunal.

Employment Judge A Ross
Dated: 5 June 2023

APPENDIX A

FINAL LIST OF ISSUES FOR HEARING ON LIABILITY

3-5 MAY 2023

(1) Whether the Respondents did the following acts:

1.1. In about July 2019 was the Second Respondent drunk at the surgery and did he:
i) Say to the Claimant, "Cor, what I would do with you", and "Let's go upstairs and make some magic".
ii) Grab the Claimant and pull her towards him, making grunting noises?

1.2. At the end of February 2021, did the Second Respondent ask the Claimant about the health of her partner, who had recently come out of hospital. When the Claimant told him that her partner was doing well:
i) Did the Second Respondent reply, "*Oh that's a shame, I was hoping to get in there*"?

1.3. On a regular basis:
i) It is admitted that the Second Respondent called the Claimant, "Blondie".
ii) Did the Second Respondent also call her "Little One".
iii) Did the Second Respondent frequently put his arm around the Claimant?

1.4. It is admitted that a client called the Claimant a "shit cunt" on 3 April 2021.
i) It is admitted that the Second Respondent subsequently offered the customer a free consultation.
ii) When the Claimant reported the former matter to the Second Respondent, did he reply, "Well you are one aren't you"?

1.5. On 8 April 2021, it is admitted that the Second Respondent invited the Claimant and others to look at a video on his phone.
i) Did he say, "Girls, girls, come here!" and give the Claimant a coy look.
ii) Did he say, "Look at this!"
iii) When the Claimant replied, "I haven't got time for this", did the Second Respondent reply, "I don't expect nothing less from you."?

Harassment under Section 26(1) Equality Act 2010

(2) If the Respondents had done the acts set out in 1 above, or any of them:

2.1. Were those unwanted by the Claimant?
2.2. If so, was the Respondents' conduct related to the Claimant's sex?
2.3. Had the Claimant proved facts from which the Employment Tribunal could conclude that the Respondents' conduct had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
2.4. If so, have the Respondents proved that the conduct did not have that effect?
2.5. Having regard to the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, did the conduct have that prescribed effect.

Sexual harassment under section 26(2) EQA

(3) Are the numbered matters in paragraph 1.1 to 1.3 above (in small Roman numerals), or any of them:

3.1. Unwanted by the Claimant;
3.2. Conduct of a sexual nature;
3.3. Had the Claimant proved facts from which the Employment Tribunal could conclude that the Respondents' conduct had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
3.4. If so, have the Respondents proved that the conduct did not have that effect?
3.5. Having regard to the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, did the conduct have that prescribed effect.

Harassment because of rejection of sexual advances: section 26(3)c) EQA

(4) In respect of the incidents in 1.4 and 1.5(iii)

4.1. Did the Second Respondent engage in unwanted conduct of a sexual nature or related to sex;
4.2. If so, has the Claimant proved facts from which the Employment Tribunal could conclude that the treatment was because of the Claimant's rejection of the sextual advances of the Second Respondent;
4.3. Had the Claimant proved facts from which the Employment Tribunal could conclude that the Respondents' conduct had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
4.5. If so, have the Respondents proved that the conduct did not have that effect?
4.4. Were the incidents in 1.4 and 1.5(iii) less favourable treatment of the Claimant?

Direct sex Discrimination under section 13 Equality Act 2010

(5) Did the Respondent treat the Claimant less favourably by doing the acts set out above at 1.1 than the Respondent treats or would treat an appropriate comparator;

(6) If so, has the Claimant proved facts from which the Employment Tribunal could conclude that the treatment was because of the Claimant's sex;

(7) If so, have the Respondents proved that the conduct did not have that effect?

Constructive unfair dismissal

(8) Did the Respondents breach the implied term of mutual trust and confidence by reason of its treatment of the Claimant by the acts at issue 1 above or any of them?
(9) Did the Claimant delay in resigning such that she waived the breach(es) or otherwise affirm the contract and insist upon further performance?

(10) If so, was each alleged act in issue 1 above (or more than one such act) an effective cause of the resignation? The Respondents contend that the resignation was because the Claimant wished to care for her late husband.

(11) If (8)-(10) are decided in the Claimant's favour, was dismissal an act of harassment and/or direct sex discrimination? If it is proved that the Claimant was constructively dismissed, the Respondents admit that the dismissal was unfair.

Wrongful dismissal

(12) If the Claimant was constructively dismissed:

a. What was the claimant's notice period?

b. Was the claimant paid for that notice period?

Jurisdiction

(13) Were the discrimination complaints made within the time limit in section 123 Equality Act 2010? The Tribunal will decide:

13.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
13.2. If not, was there conduct extending over a period?
13.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
13.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

APPENDIX B

LEGAL FRAMEWORK

1. Save where stated, all section references below refer to the Equality Act 2010.

Jurisdiction: section 123 EQA

2. A distinction is to be drawn between a single act (which may have continuing consequences) and a continuing act arising from a policy, rule, scheme or practice operated over time: *Barclays Bank v Kapur* [1991] ICR 208.

3. Tribunals should not take too literal an approach to the question of what amounts to a continuing act by focusing on whether the concepts of policy, rule, scheme or practice fit the facts of the particular case. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." Instead, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs in which female officers were treated less favourably: Hendricks v Commissioner of Police for Metropolis (2003) ICR 530 at paragraph 54.

Harassment

4. Section 26 provides, where relevant:

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

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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."

"Related to"

5. The question of whether unwanted treatment 'relates to' a protected characteristic is to be tested applying the statutory language without any gloss ***Timothy James Consulting Ltd v Wilton*** **UKEAT/0082/14/DXA**. In ***Bakkali v Greater Manchester Buses (South) Ltd*** **[2018] IRLR 906, EAT** Slade J held that the revised definition of harassment in the Equality Act 2010 enlarged the definition:

'In my judgment the change in the wording of the statutory prohibition of harassment from 'unwanted conduct on grounds of race …' in the Race Relations Act 1976 s 3A to 'unwanted conduct related to a relevant protected characteristic' affects the test to be applied. Paragraph 7.9 of the Code of Practice on the Equality Act 2010 encapsulates the change. Conduct can be 'related to' a relevant characteristic even if it is not 'because of' that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, 'related to' such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted 'the mental processes' of the alleged

harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant.'

6. The need for a tribunal to take a rigorous approach to the question of whether conduct related to a protected characteristic was recently emphasised in *Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495, EAT:

'The broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be.'

Proper application of section 26(1)(b) and (4)

7. In respect of the proper application of section 26(1)(b) and (4), which deal with the proscribed consequences of the unwanted conduct, the Respondent relied on Dhaliwal v Richmond Pharmacology [2009] IRLR 336. Although that was a case decided before the Equality Act 2010, the provisions in issue were at section 3A Race Relations Act 1976, and were similar to those in section 26. We find it helpful to set out the following extracts of the judgment of Underhill J(P) which we were directed to:

"*14 Secondly, it is important to note the formal breakdown of "element (2)" into two alternative bases of liability—"purpose" and "effect". That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so). It might be thought that successful claims of the latter kind will be rare, since in a case where the respondent has intended to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of "element (3)" as discussed below).*

15 Thirdly, although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable *that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase "having regard to … the perception of that other person" was liable to cause confusion and to lead tribunals to apply a "subjective" test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt . See also our observations at para 22 below.*

…

22 On that basis we cannot accept Mr Majumdar's submission that Dr Lorch's remark could not reasonably have been perceived as a violation of the claimant's dignity. 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. But we are satisfied that the tribunal, which clearly considered the case most conscientiously, was entitled to hold that what it found Dr Lorch to have said did indeed fall on the wrong side of the line. We can see no error of law in its decision and this appeal must be dismissed."

8. The passage above is authority for the proposition that the criterion in section 26(4) EQA were overall objective criterion. The Tribunal found that, applying Dhaliwal and the reasoning of Underhill J, this was a correct interpretation of the law.

9. The Tribunal considered Paragraph 22 of Dhaliwal, and Paragraph 13 of Grant v HM Land Registry [2011] IRLR 751. In Grant, having approved Paragraph 15 of Dhaliwal, Elias LJ held:

"*13 Ms Monaghan submitted that this was erroneous because it confused purpose and effect. She says that the intention of the speaker can be relevant only where the purpose is in issue. I do not agree. When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.*

....

47..... Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

10. We directed ourselves that not every unwanted comment related to a protected characteristic may violate a person's dignity or create an offensive atmosphere. We also reminded ourselves that it is important not to impose legal liability for every unfortunate phrase. We considered that, at least as a matter of practice rather than law, more than in other areas of discrimination law, context is everything in cases where harassment is alleged. Put shortly, the context in which words are used is relevant to their effect.

11. The EHRC Code of Practice at paragraph 7.18 says the following about when conduct should be taken as having the effect of creating the circumstances proscribed by Sub-section 26(1)(b):

7.18 In deciding whether conduct had that effect, each of the following must be taken into account:
a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.
b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.
c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.

Harassment and Constructive dismissal

12. Section 39(7)(b) EQA confirms that a discriminatory dismissal contrary to section 39(2)(c) includes a constructive dismissal, by using wording similar to that found in section 95(1)(c) ERA: dismissal "*includes a reference to the termination of B's employment ... by an act of B's (including giving notice) in*

circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

13. A constructive dismissal was capable of constituting an act of harassment within the meaning of the Equality Act 2010 s.26: Driscoll v V&P Global Limited [2021] IRLR 891.

Direct Discrimination

14. The Tribunal directed itself to Section 13, which contains the definition of direct discrimination. When considering the question of the appropriate comparator, we also considered section 23(1):

"On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."
"Because of"

15. We remind ourselves that the Tribunal must look to determine the causation of the treatment – by asking the "reason why" question. But the Tribunal does not need to go further and decide whether the reason for the treatment was a deliberate intention to discriminate. Discrimination may be unconsciously carried out: see R(E) v Governing Body of JFS and the Admissions Panel of JFS [2010] IRLR 136 at paragraph 62 - 65 per Lady Hale. The motive or intention of the putative discriminator is irrelevant.

16. In the JFS case, at paragraph 63, Lady Hale applied the following passage in the judgment of Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572:

"*in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator*."

The Burden of Proof Provisions

17. In the event, although the Tribunal considered section 136 EQA, it did not find it necessary to apply it in this case, where positive findings of fact have been made which did not depend on whether the burden of proof had shifted or whether the Respondents had then managed to discharge it.

Constructive Dismissal

18. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

19. The burden was on the employee to prove the following:

    (i) That there was a fundamental breach of contract on the part of the employer;

(ii) That the employer's breach caused the employee to resign;

(iii) The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

20. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

20.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

20.2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International* [1998] AC20 34h-35d and 45c-46e.

20.3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

20.4. The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

20.5. A breach occurs when the proscribed conduct takes place: see *Malik*.

20.6. Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.

20.7. In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.

21. In Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR, the Court of Appeal approved the guidance given in Waltham Forest LBC v Omilaju (at paragraph 15-16). Reading those authorities, the following comprehensive guidance is given on the "last straw" doctrine:

21.1. The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: Lewis v Motorworld Garages Ltd [1986] ICR 157, per Neill LJ (p 167C).

21.2. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (Glidewell LJ at p 169F)

21.3. Although the final straw may be relatively insignificant, it must not be trivial.

21.4. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

21.5. The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

21.6. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

21.7. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

21.8. If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract, he cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

21.9. The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

21.10. Even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last

straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the Malik threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

21.11. The affirmation point discussed in Omilaju will not arise in every cumulative breach case. "There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)." (per Underhill LJ).

22. We note that a breach of trust and confidence has two limbs:

22.1. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee and

22.2. that there be no reasonable or proper cause for the conduct.

Reasonableness: s.98(4) Employment Rights Act 1996

23. In determining whether a constructive dismissal was unfair, it is for the employer to show that the reason for the dismissal is a potentially fair reason within s.98 Employment Rights Act 1996. (In this case, the Respondents accepted that if a constructive dismissal was proved, it would be an unfair dismissal.)