EMPLOYMENT TRIBUNALS

Claimant: AB

Respondent: Grafters Group Limited (t/a CSI Catering Services International)

Heard at: **Cardiff ET** **On:** 25th and 26th April, 12th May 2023

Before: EJ J Bromige, Mr. Horne, Mr. Roberts

Representation
Claimant: In Person
Respondent: Mrs. S Davies (Operations Director)

1. The provisions of the Sexual Offences Amendment Act 1992 apply to this judgment. Under those provisions no matter relating to any person against whom alleged sexual offences have been committed shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify those persons as victims of those alleged offences.

RESERVED JUDGMENT

2. The unanimous decision of the Tribunal is that the Claimant was subject to sexual harassment within the meaning of section 26(3) Equality Act 2010 by CD. This sexual harassment did not occur in the course of CD's employment with the Respondent within the meaning of section 109(1) EqA 2010.

3. Therefore, the Claimant's claim of sexual harassment against the Respondent is dismissed.

REASONS

4. The above case was heard at Cardiff ET on 25th and 26th April 2023, in person. The Claimant presented the ET1 on 10th April 2022, concerning an allegation of sexual harassment which she says occurred on 1st November 2022.

5. The Respondent is a Hospitality Recruitment Agency, specializing in the hospitality and catering sector. The Claimant, and her colleague CD, worked from the Cardiff Branch of the Respondent. The Respondent would offer shifts at various locations across South Wales and the West of England for its employees, often catering or bar work at sporting events.

6. The Claimant's case is that on 1st November 2021 she was due to work at Hereford Race Courses. She was late arriving at the Respondent's office in Cardiff, where transport was to take her to Hereford. Instead she was provided a lift by CD, who then told her she was not required to work that day. She requested to be taken home, but instead CD drove her to a golf course near Pontypridd and sexually assaulted her.

7. The Respondent resists this claim, primarily on the basis that whatever happened in the car on 1st November 2021, they are not liable for CD's actions as this did not occur in the course of CD's employment with them. The Respondent has chosen not to call CD as a witness, and neither party have sought to join CD as a Second Respondent. It is not clear if CD is even aware of these proceedings.

8. The Claimant reported the alleged assault to the Police the same day, who investigated the matter and interviewed CD under caution. Ultimately no criminal charges were brought against CD. However, by virtue of having made the allegation to the Police on 1st November 2021, the provisions of the Sexual Offences Amendment Act 1992 apply.

9. In addition to those provisions, EJ Jenkins made an indefinite Rule 50 order under the Employment Tribunal Rules of Procedure 2013 on 22nd August 2022. The order applied to both the Claimant (who is referred to as "AB" in any public document entered on the Register), and the alleged perpetrator of the sexual assault, who is referred to as "CD".

10. EJ Jenkins made a further Restricted Reporting Order on the same date under section 11 of the Employment Tribunals Act 1996 and rule 50(1) of the ET Rules 2013. The terms of the order prohibit the following:

    …the publication in Great Britain, in respect of the above proceedings, of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain in relation to any person specified in this order any matter likely to lead members of the public to identify him as being a party to or otherwise involved with these proceedings.

11. The order applies to both the identity of AB and CD. Whilst the order under s.11 ETA 1996 expires at the point of promulgation of this judgment (as per s.11(1)(b)), the effect of the further Rule 50 order is that there is an indefinite reporting restriction applying to this case.

Procedural History

12. This case had been extensively case managed by the Tribunal, including 3 separate preliminary hearings and multiple directions from Employment Judges at Cardiff arising from the correspondence of one or both parties. Notwithstanding every effort made by the Tribunal to ensure that the final hearing ran smoothly, we were concerned about the approach of the Claimant to the directions and orders of the Tribunal, which caused significant delay to the final hearing.

13. We set out the procedural history of this case, with the relevant directions:

a. On 22nd August 2022, a case management hearing was held by EJ Jenkins. The Judge clarified the list of issues in the CMO, and set standard directions for disclosure and preparation of the bundle. The bundle was to be agreed by 7th November 2022 and limited to 500 pages.

b. On 21st November 2022, EJ Bromige made several directions after it was clear that the parties were unable to agree the contents of the bundle. This included a direction that the Claimant must disclose the Victim's Right to Review report from the police, serve a schedule of loss (which had been due on 12th September 2022), and reminding the Claimant that she should not redact or edit documents prior to disclosure.

c. On 12th January 2023, a second case management hearing was dealt with by EJ Jenkins. He reminded the parties that *"documents to be considered at the final hearing should be in their original, unedited format"*. Given the difficulties with agreeing the bundle, he further directed that the Claimant should provide three examples of documents she contended were relevant for the Tribunal to make a ruling. The Claimant did not do this. The Claimant was further directed to provide an unedited version of the VRR by 26th January 2023. From this we infer that the Claimant had not complied with EJ Bromige's direction about the VRR, or redacting documents.

d. On 8th March 2023, a further case management hearing before EJ Lloyd-Lawrie amended the directions so that bundles and statements were to be mutually exchanged on 23rd March 2023. The bundles were limited to 250 pages per side.

14. The Claimant failed to comply with any of the above directions, and failed to provide a proper explanation for her repeated breaches. The file was referred to EJ Moore who on 19th April 2023 directed that the Claimant must serve her witness statement and bundle, limited to 250 pages, by 4pm Friday 21st April 2023. The Claimant yet again failed to comply with this direction.

15. At 1556hrs on 24th April 2023 (i.e. the day before the final hearing), the Claimant emailed her witness statement and bundle to the Respondent and the Tribunal. The witness statement, which did not have numbered paragraphs or sensible formatting, ran to 109 pages. The bundle (which also incorporated the witness statement, so there was an element of duplication), was 978 pages in length. It contained many documents which had been edited, or had a commentary added to them, in breach of the direction of EJ Jenkins in January 2023.

At the hearing

16. The case was delayed on 25th April 2023 due to the late arrival of both parties. The Claimant had failed to provide hard copies of her bundle, again in breach of the order of EJ Lloyd-Lawrie, and so the we directed that all witnesses could use their laptop to access the bundle during evidence, on the understanding that they had the WiFi disabled so not to receive any external communication.

17. The Tribunal further indicated to the Claimant that it was not going to consider the bundle in its present form, given that it was significantly over the page limit, contained edited documents, and that there were no page references in the witness statement to cross-reference. Instead, and with reference to the list of issues, the Tribunal requested that the Claimant highlight the relevant parts of her witness statement, and provide a core reading list of no more than 250 pages by 1130 that morning.

18. The Claimant confirmed in writing that the following pages were relevant: 18, 96-109, 287, 384, 396, 401-402, 433-436, 449, 453, 498-516, 553-554, 633, 692, 718, 729-730, 739-740, 746-752, 762, 765, 771-772, 775, 787-789, 796-816, 819-835, 867-918, 948. She also referred to pgs. 19-39 of her witness statement. We were also referred to other pages within the Claimant's bundle during the cross-examination of the witnesses.

19. Given the late receipt of the Claimant's bundle, and the size of the witness statement, we decided to reverse the order that the parties gave evidence, so the Respondent gave their evidence first. This was primarily to allow the Respondent time to consider the Claimant's bundle overnight to prepare cross-examination of the Claimant, and also avoided the need for a further adjournment during the sitting day.

20. We referred to the Respondent's bundle as "Bundle A", and the Claimant's bundle as "Bundle B". We had witness statements from the Claimant, and Mrs Davies and Ms Noble for the Respondent. We heard oral evidence from all three witnesses, and were referred to pages in the bundles.

21. At the end of Day 1, it was apparent to the Tribunal that both sides may not have fully complied with their disclosure obligations. The Claimant's bundle contained several examples of emails where she had annotated with notes (for example, B786), despite having been told specifically by EJ Jenkins not to do this. The Respondent had included a potentially important email in Bundle A (A156) which had been copied into another document, and so was missing details of when the email was sent and to whom. The Tribunal was also concerned that in both bundles email chains were missing or incomplete, even when cross-referencing between the two.

22. Therefore we ordered both parties to provide further disclosure by 0930 on 26th April 2023. The Claimant's additional disclosure would be "Bundle C", and the Respondent's "Bundle D". The Claimant was required to provide, in chronological order, all emails between her and the Respondent regarding the Hereford assignment from 27th October – 1st November 2021. The Respondent was subject to a similar direction, which also included a requirement to disclose emails between CD and the Respondent during the same period, and the original email at A156.

23. The Respondent provides Bundle D in accordance with the direction (although missing the A156 email) on 26th April. It ran to 46 pages. At 08:54hrs that day the Claimant emailed the Tribunal. She stated that in regard to the specific disclosure direction, she would submit her evidence as soon as she had a chance to compile it. Apart from a reference to the situation being *"overwhelming"*, there was no explanation as to why the Claimant had not complied with our direction.

24. The Claimant then arrived late at the Tribunal that day. The Claimant said she had arrived at 10:07hrs, but the result was that the hearing did not start until 10:35hrs. The Tribunal then had to spend further time exploring the Claimant's failure to comply with the specific order direction. She stated that she had email issues that morning (although had been able to email the Tribunal), and laptop difficulties (although she had been able to use her laptop throughout Day 1, and was using it during Day 2 with no problems).

25. The Tribunal recognised that the Claimant was a litigant in person, and also was bringing claims that sexual violence had been inflicted upon her, which would understandably be difficult, if not traumatic, to present herself. However, the Tribunal also identified that various Employment Judges had on previous occasions taken every step to vary and amend directions, and not to impose any sanction on the Claimant for repeated breaches. The view of the Tribunal was that the Claimant was unable to appreciate that she had breached the various orders, or understand the consequences of such breaches. From time to time, the Tribunal had to adopt a robust approach with the Claimant, in particular around issues of the bundle (where the Claimant was not prepared to give page references and expected the Respondent's witnesses or the Tribunal to identify a specific page), or the multitude of edited documents contained in the Claimant's bundle.

26. The Tribunal had to curtail the cross-examination of Ms Noble by the Claimant at 1315hrs on 26th April 2023. Because of the Claimant's late arrival that day, as well as the delays on Day 1 (see below), Ms Noble started giving evidence at 11:15. A lot of the Claimant's questioning of Ms Noble was unfocused, or did not relate to relevant issues. The Judge sought to focus the Claimant with reference to the list of issues, in particular the question as to whether CD was acting in the course of his employment on 1st November 2021.

27. After an adjournment at 12:10hrs for the Respondent to confirm a query about pg. A167, the Judge told the Claimant she should conclude her questioning of Ms Noble by 1250hrs to allow questions from the panel, and for the Claimant to be able to give evidence in the afternoon. We allowed the Claimant some further time, but by 1315hrs we were concerned there would not be sufficient time to conclude all the evidence and hear submissions. The Tribunal therefore exercised its general case management powers under rule 2 and rule 29 to curtail the Claimant's questioning.

Cross-examination of the Claimant

28. Before the Claimant was cross-examined, we enquired with the Respondent as to the extent of their planned questioning about CD's alleged actions on 1st November 2021. We did this because we recognised that the Respondent was also representing themselves, and so might not articulate questions in as focused and sensitive way as a professional advocate, and also because as per the ET3, the Respondent did not appear to be directly challenging the Claimant's account of CD's actions.

29. We stressed that the Respondent was entitled to put the Claimant to proof of her case, including what she said CD had done, but wanted to ensure

that the Claimant was not put to additional emotional distress by giving evidence about the alleged assault that was not actually going to be disputed. If the Respondent wished to question the Claimant about these matters, they would be required to provide proposed questions in writing, so the Tribunal could ensure the questions were appropriate. In fact, the Respondent confirmed it was not challenging the Claimant's version of events, but maintained that CD was not acting in the course of his employment, and questions would be limited to this issue.

After the hearing

30. At 13:23hrs on 4th May 2023, the Claimant sent two further bundles to the Tribunal, purporting to comply with the Tribunal's direction. By this stage the Tribunal had concluded all evidence and submissions, and was due to meet in Chambers for deliberations on 12th May 2023. The two bundles ran to 141 pages. The Claimant's explanation was that she was delayed in providing these because of *"coughing and fever"*, which the Tribunal found unsatisfactory, since the Claimant had displayed no symptoms during the hearing in April (she did tell us she had contracted Covid-19 earlier in April 2023). We declined to consider these additional documents for two reasons. Firstly, the hearing had concluded all evidence and so to reconvene the Tribunal to hear additional evidence would cause additional delay and expense to all parties (the earliest the Tribunal could have reconvened would have been August 2023). Secondly, the Claimant had been given every opportunity throughout the litigation process to provide full disclosure in a sensible format and been unable to do so.

The Claimant's application for strike out

31. The Claimant's application to strike out the Respondent's response was at B937-947. The Claimant submitted that the conduct of the Respondent in carrying out its defence throughout proceedings had caused her distress, and that the Respondent had *"selectively and conveniently responded irrespective of the Practice Directions and Flouted Court Orders…"*.

32. The Tribunal viewed this application under Rule 37 of the ET Rules as being under r.37(1)(b) *"that the manner in which proceedings have been conducted by the Respondent has been scandalous, unreasonable or vexatious"* and r.37(1)(c) *"for non-compliance with any of these Rules or with an order of the Tribunal"*.

33. In oral submissions, the Claimant also indicated that the Respondent's defence had no prospects of success since the evidence in her bundle overwhelmingly proved that CD had been at work at the material time. She did not take us to any particular part of her witness statement or bundle however.

34. As to this last point, the Tribunal directed itself as per *Anyanwu v South Bank University* [2001] ICR 391 HL and *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126. In particular, per *Anyanwu*, we reminded ourselves that the questions of law in discrimination cases are often highly fact sensitive. It would be an unusual course to take, on the morning of the final hearing, with over 1000 pages of evidence before us, to make a finding that the Respondent had no reasonable prospects of showing that CD was not

acting in the course of his employment. Notwithstanding that the Respondent was not calling CD as a witness, from our preliminary reading of the documents and statements, it appeared that this was an issue which would require determination after hearing the evidence.

35. Turning to the application under r.37(1)(b), the Claimant was asked to provide examples of allegations of scandalous or vexatious treatment. The Claimant linked this to the breaches of Tribunal Orders by the Respondent. The Tribunal asked the Claimant to provide examples of these breaches, which the Claimant indicated had occurred around the preparation of the final hearing bundle in November 2022. She submitted that the Respondent had also failed to comply with directions on 12th December 2022, 2nd February and 1st March 2023. She also referred to the Respondent's actions requiring additional directions to be made by EJ Bromige on 22nd November 2022, despite the fact that these directions had primarily arisen from her failure to comply with previous directions.

36. The Tribunal's judgment was that even if the Respondent had breached directions in late 2022, it had fully complied with the directions for bundle and witness statements made by EJ Lloyd-Lawrie on 8th March 2023. It was ready and prepared for the final hearing, and therefore there was no prejudicial impact from the Respondent's previous alleged breaches. This was in contrast to the Claimant, who had breached EJ Moore's order for a witness statement and bundle of 250 pages to be served by 21st April 2023, as well as other breaches that we have already identified. In such a scenario, where one party had failed at nearly every stage to comply with the Tribunal's orders, it would have been wholly disproportionate to strike out the other party for a relatively minor breach which did not impact upon the effectiveness of the final hearing.

37. Therefore the Claimant's application for strike out was refused.

Myths and Assumptions in cases concerning sexual assault

38. In this judgment, the terms "sexual assault" and "sexual violence" have been used to describe the allegations the Claimant brings. Before we heard evidence, the Tribunal reminded itself that it was not considering the allegations as those of amounting to a criminal offence, and that the legal ingredients for sexual assault under section 3 of the Sexual Offences Act 2003 were different and distinct from the ingredients of sexual harassment under s.26(3) EqA 2010. We were only concerned as to whether sexual harassment had taken place.

39. However, we were also fully aware as to what the nature of the "unwanted conduct" (to adopt the language of s.26 EqA) was. The Claimant's case was that she had been sexually assaulted. The Tribunal therefore directed itself as to an amended "assumptions" direction which is often used in the Crown Court to direct a jury as to the danger of assumptions and myths about sexual violence. We did so in our role as an Industrial Jury, hearing evidence concerning criminal sexual conduct. The direction was[1]:

[1] This direction is amended from a direction which appears at 20-5 of Part 1 of the Crown Court Compendium (updated June 2022)

We remind ourselves that we must not let any false assumptions or misleading stereotypes about sexual assault affect our decision making in this case. It is recognised from experience gained in the criminal justice system that there is no typical sexual assault, no typical person who commits sexual assault, or typical person who is the victim of sexual assault. Sexual assault can take place in almost any circumstance. It can happen between all different kinds of people, quite often when the people involved are known to each other. We also know that there is no typical response to being sexually assaulted. People can react in many different ways and these reactions may not be how we would expect or think we would react in the same situation.

Findings of Fact

40. The Claimant registered to work with the Respondent on 2nd August (A113) and worked her first shift on or around 1st September 2021 (A149). The Claimant didn't have a minimum requirement for work but was offered work frequently, often up to a week in advance. Ms Noble would email out vacancies for staff to respond to. If staff accepted work on any particular day, it would be booked onto the ASPIRE System, a third party software used by the Respondent.

41. The Respondent's system showed that the Claimant's first shift was in fact 9th September, although we accept from the paper evidence that it was 1st September. We were also shown evidence that the ASPIRE system did not have a record of an employee named "Cecilia", despite there being documentary evidence of her working for the Respondent at this time. The Tribunal is not satisfied that the ASPIRE software was wholly accurate or reliable in recording the work performed by employees.

42. When an employee was booked for a shift, this would show as "Booking Filled" on ASPIRE (an example of this is at A154). We were told that the system would generate a confirmation booking email, and Ms Noble referred us to examples in the bundle. However the Tribunal concluded that whilst these emails may have been based on a template, they were all written by Ms Noble, and not an automatic product of ASPIRE.

43. When a shift was cancelled, the system would display "Booking Unfilled". We accept Ms Noble's evidence that the system would not generate an email to the employee telling them of the cancellation, but rather she would either email or phone the employee to notify them.

44. On 27th October 2021, Ms Noble emailed out to all workers stating that *"next week is absolutely bananas"* and providing a number of shifts that needed working between 1st and 7th November. This included a Bar Work assignment at Hereford Races. The details of the assignment was that a lift was to be provided (B434), leaving the Respondent's office at 07:30hrs.

45. The Claimant replied at 1418hrs on 27th October (D23) stating *"pls note my confirmation of assignments for in the order preference pls – all Racecourse(s)…"*. Ms Noble replied at 1422hrs indicating that the Claimant was booked for the Hereford job on 1st November, as well as three other shifts, and asking her to confirm if this was suitable.

46. There was then a further exchange of emails between Ms Noble and the Claimant on 27th October (D20-D22) about shifts between 1st and 7th November. A screenshot from the ASPIRE record for the Claimant (A152) showed that the Claimant was recorded as "Booking Filled" for the 1st November shift at 14:20hrs on 27th October 2021. This accords with the email correspondence we have been referred to. The booking was changed to "unfilled" at 11:30 on 29th October 2021.

47. The Respondent struggled to provide transport for the employees who were booked to work at Hereford and this was communicated to the Respondent's point of contact at Hereford, Shaun Richards, on 28th October (D16). Transport was arranged with Mr Richards driving and an email was sent to the 4 employees who did work that shift (A156 – 157). Whilst this email does not have a timestamp on it (and we have not been provided with the original email), the Tribunal finds it more likely than not that this would have been sent on or around 29th October 2021. This is because the email at D18 is time-stamped 13:01hrs and the Claimant's shift was cancelled at 11:30, indicating that Ms Noble was resolving the transport situation during that period.

48. We find that the Respondent did cancel the Claimant's shift and was not expecting her to work on 1st November 2021, however we also find the Claimant did genuinely believe that she was due work that day. We prefer the Claimant's evidence that she received no communication from Ms Noble about the shift being cancelled. She purchased new black shoes on 31st October for work (B794) and booked a taxi to take her to the Respondent's office (B795), although this arrived after 06:30 that day, and she therefore missed the transport. These were all steps which support her assertion that she was not told of the shift cancellation.

The Claimant's communications with CD

49. Whilst the Respondent did not provide transport to the majority of the shifts it booked its employees for, it did operate a system where one of the employees on that shift would drive the others, in exchange for payment. That payment was made directly by the employees to the driver, with the amount communicated to them in advance. An example of this is B644.

50. On 9th October, the Claimant was booked to work at Chepstow Races, with someone called Ms Paton providing transport. The Claimant says, and we accept, that in fact CD drove her to Chepstow that day. They exchanged mobile numbers.

51. The Claimant and CD exchanged messages via WhatsApp frequently after this. Some of these messages, from CD to the Claimant, were sexual in nature. For example, CD told the Claimant that he had *"too many girls pestering me"* (B670), that *"sex is fun like sometimes you fancy or might want to sleep with someone you have only seen not met…"* (B681) and referred to sex outside of marriage as not being a sin *"unless they try* [to] *rape you"* (B681).

52. Further, in the early hours of 1st November 2021, he asked the Claimant if she knew how to kiss, and that he could teach her (B690), and if *"boys in India find you beautiful"*. He referred to her as *"My Pakistani princess"*

(B741) and asked her when she was getting a taxi in the morning. The Tribunal concluded that CD believed the Claimant was due to work at Hereford the following morning.

53. The Tribunal was concerned that the Claimant had not provided the full WhatsApp transcripts between herself and CD, especially around 1st November. The messages were contained in Bundle B from 669-741, however were not in chronological order, often skipped between different dates and times, and were missing certain parts of the conversation (as demonstrated by the first message at B691). Whilst the Claimant submits that CD must have been told by the Respondent that she was due to work at Hereford, given the Tribunal's finding that the Respondent was not expecting the Claimant to work on 1st November, we find it more likely than not that the Claimant had told CD that she was working that day.

54. At the time that CD was messaging the Claimant in the early hours of 1st November, he was working for the Respondent at a shift at Amazon's premises in Bristol. He had been booked to work multiple Amazon shifts between 26th – 31st October (A166). Whilst the ASPIRE software said these shifts ended at 23:59hrs each day, the Tribunal is satisfied that this is an error. As well as the Tribunal's finding about the accuracy of the software, it was clear that these shifts were advertised (and booked) as ending between 03:00 – 04:00 the following morning. Examples of this include CD's booking confirmation for 28th October (D40) and also that other shifts on 1st and 2nd November 2021 which were offered to the Claimant, again with the 04:00 end time (D32).

55. CD tried calling the Claimant on 6 occasions via WhatsApp between 05:37 and 06:15 (B799). For someone who was not working at Hereford that day, the Tribunal observes that he was showing a high level of interest into the Claimant's movements that morning. The Claimant arrived late and missed the transport (B802) and CD offered to take her to Hereford (B803). The Tribunal finds that the Claimant was in CD's car shortly after 07:00hrs on 1st November.

1st November 2021

56. Whilst the Tribunal did not hear from CD, we did have the Claimant's witness statement, her oral evidence and also an account of what CD told the police, as summarised in the Victim's Right to Review document contained in both bundles A and B. From those various sources, we find that shortly after the journey began, CD stopped to put petrol in his car, when he had a telephone conversation with a colleague at the Respondent. This colleague told CD that the Claimant was not due to work that day which CD then relayed to the Claimant.

57. The Claimant asked CD to drop her off at a bus stop, which CD refused to do. As they were driving, he slid his hand under her coat and placed it on her abdomen. He kept it there whilst continuing to drive the car. He showed her a pornographic video on his mobile phone, and he asked her about whether she knew what an orgasm was, and referred to a "threesome" in the context of a sex act.

58. The Claimant thought he was driving towards Pontypridd Golf Club when he stopped the car along a road, before touching the Claimant's chin and trying to place his finger in her mouth. He asked her to kiss him. The Claimant did not respond and so he licked his own finger before placing it in her ear. We note that CD admitted to the police that he had placed his finger in her ear (described as a "wet willy"), and whilst the Claimant says this occurred continuously for a period of 15 minutes, we do not need to make findings as to the extent or length of this incident.

59. Eventually the Claimant was able to escape from CD, and she phoned one of the Respondent's managers, James English (A154). He told her to phone the police, which she already had done so at 08:27hrs (A181). She provided a witness statement to the police at 1138hrs that day (which the Tribunal have not seen). The Police report also refers to the Claimant having made a retraction statement on 6th November (A182), which again, the Tribunal has not seen. The Tribunal notes that the police summary is that the Claimant *"withdrew her support for a Prosecution"*, which the Tribunal finds is not necessarily the same as telling the Police that she had not actually been assaulted.

60. On 11th November 2021, CD was arrested and interviewed under caution. He told the police he had put his finger in her ear as a practical joke, but denied any form of sexual assault (A182).

61. Notwithstanding that there was an ongoing police investigation, at least until 14th December 2021 when CD was released by the police without charge, the Tribunal is concerned that the Respondent seems to have done nothing to either investigate CD, or to provide any level of support or care to the Claimant, who was making a very serious allegation of sexual assault.

62. The Claimant did not work another shift for the Respondent, although she told the Tribunal (and we accept) that prior to 1st November 2021, she had decided not to accept any further work with the Respondent after 7th November 2021, and would have confirmed her resignation subsequently.

The Law

63. Section 26(2) EqA 2010 states:

A 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)

64. If we find that there was unwanted conduct by CD, we need to go on to consider whether that conduct was of a "sexual nature". In *R (on the application of the Chief Constable of Dyfed Powys Police) v Police Misconduct Tribunal* [2020] IRLR 964, the High Court was required to consider the findings of a Police Misconduct Tribunal re: allegations of sexual harassment against a Police Constable. Whilst not dealing with a complaint under s.26, the commentary in the IDS Handbook confirms that the legal definition is one and the same (see also §55 of the judgment, where the High Court directs itself as to the statutory language of s.26 EqA 2010).

65. At §68 of the judgment, the High Court stated that:

The Tribunal's assessment of PC England's conduct towards PC A was that his conduct was 'part of a wholly inappropriate, misguided, crass and objectionable series of attempts by him to try and make a friend of PC A', but found that his touching of her was not sexual and not intended to be sexual. That latter factual conclusion was, in public law terms, irrational. But more importantly, limiting the question only to whether his touching of PC A was sexual was a misdirection. The Tribunal needed to assess the events as a whole and decide whether PC England's conduct was 'unwanted conduct of a sexual nature'. On the unchallenged evidence there was only one answer to that question: it was. Yet the Tribunal made no finding on this point.

66. Therefore in order to find whether the conduct was sexual in nature, we need to assess "events as a whole". Therefore we will need to analyse our findings of facts as to the interactions between the Claimant and CD in the days preceding this allegation, and whether any of these interactions were themselves sexual in nature, such that they could support an inference or conclusion that any unwanted conduct within the car could also be said to be sexual in nature.

67. If s.26(2)(a) is proven in favour of the Claimant, we must go on to consider the effect of the conduct. Section 26(1)(b) states:

(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

68. When deciding whether the conduct has the effect referred to in subsection (1)(b), the Tribunal must take into account (a) the perception of B, (b) the other circumstances of the case and (c) whether it is reasonable for the conduct to have that effect – s.26(4).

69. Section 26(4) requires both a subjective and objective analysis of the effect of the conduct. In particular, s.26(4)(c) is an objective test. Per *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 at para [15]:

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.

70. If we conclude that sexual harassment did take place, we would then need to consider the Respondent's defence under s.109(1) EqA 2010 – that the actions of CD that day were not done by him *"in the course of his employment"*.

71. In *Jones v Tower Boot Co Limited* [1997] ICR 254, the Court of Appeal held that *"in the course of employment"* should be construed *" in the sense in which every layman would understand them. This is not to say that when it comes to applying them to the infinite variety of circumstances which is liable to occur in particular instances – within or without the workplace, in or out of uniform, in or out of rest-breaks – all laymen would necessarily agree as to the result… the application of the phrase will be a question of fact for each industrial tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort".*

72. In *Chief Constable of Lincolnshire Police v Stubbs* [1999] ICR 547, the EAT stated (in the context of a dispute about whether a work social gathering was "in the course of employment"):

    it is entirely appropriate for the tribunal to consider whether or not the circumstances show that what was occurring was an extension of their employment. It seems to us that each case will depend upon its own facts. The borderline may be difficult to find. It is a question of the good exercise of judgment by an industrial jury. Whether a person is or is not on duty, and whether or not the conduct occurred on the employer's premises, are but two of the factors which will need to be considered.

73. Whilst further cases indicate fact specific judgments as to which side of the line a set of particular circumstances fall, we will need to focus on our findings of fact, and whether those findings amount to someone acting in the course of their employment. The belief of the Claimant that CD was acting in the course of his employment is irrelevant.

Conclusions

74. The first question for the Tribunal is whether CD subjected the Claimant to unwanted conduct whilst in his car on 1st November 2021? The Tribunal finds that there was unwanted conduct, namely the physical touching, asking the Claimant to kiss him, showing the Claimant a pornographic video on his phone, and talking to the Claimant about sexual acts.

75. Secondly, was this conduct of a sexual nature? The Tribunal unanimously agrees that all of the unwanted conduct was sexual. We infer this, both from the request for a kiss, and the showing of the pornographic video, but also the manner of the contact on the abdomen, as well as the previous messages that CD had sent the Claimant in October 2021, which were also at points, sexualised.

76. As to whether the unwanted conduct had the requisite purpose or effect as per s.26(1)(b), the Tribunal is satisfied that it did. It was clear to the Tribunal, even now, this unwanted conduct has had a long lasting impact upon the

Claimant. Immediately after it happened, she phoned the police, and her evidence throughout has been that the environment in CD's car, where she was unable to remove herself, was hostile and intimidating. The Tribunal is further satisfied, considering the elements at s.26(4), that it was reasonable for this unwanted conduct of a sexual nature to have that effect upon the Claimant.

77. Having found that CD did subject the Claimant to sexual harassment, we then are required to determine whether the Respondent is liable for such actions, because this sexual harassment occurred *"in the course"* of CD's employment.

78. The Tribunal's judgment is that CD was not acting in the course of his employment from around 06:00 onwards on 1st November 2021 for the following reasons:

    a. We do not find that CD was either due to work at Hereford that day, or that he was required by the Respondent to drive the Claimant there. He had only finished a shift at Amazon a few hours before hand, and there is no evidence that he was booked to work at the Racecourse.
    b. There is clear and undisputed evidence that the Respondent had arranged transport, namely through Mr Richards, to get the employees to Hereford. Whilst the Claimant wasn't aware she had been cancelled for work that day, it was her aim that morning to make that transport. The only reason she got into CD's car was because she missed it.
    c. We do not accept the Claimant's submission that the Respondent required or expected informal lifts between colleagues. Rather there are several examples of a formal notification of drivers/lifts, where the Respondent specified a driver to take employees to work, and the amount of payment required. That was not what happened here. We conclude that whatever CD's motive was in offering a lift on 1st November, it was not because of a requirement linked to his employment.
    d. Further, having missed the transport, it was CD that offered to drive the Claimant. However this was not arranged or sanctioned by the Respondent, they had no knowledge of it, nor would it have been required because the Claimant was not due to work.

79. Whilst we accept the Claimant believed she was required at work, and so she believed she was at all times *acting* in the course of her employment her belief is irrelevant to the objective conclusion we have to reach as whether CD was acting in the course of <u>his</u> employment (and not, whether he thought he was).

80. Therefore, whilst we have found on balance of probabilities that CD did sexually harass the Claimant in his car on 1st November 2021, both through unwanted physically touching and comments, the Respondent is not liable for the actions of CD under s.109(1) EqA 2010, because the actions of CD were not done in the course of his employment with the Respondent.

81. Accordingly the Claimant's claim for sexual harassment against the Respondent is dismissed.

Employment Judge **J. Bromige**

Date: 7th June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 8 June 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche