



# EMPLOYMENT TRIBUNALS

**Claimant:**

G

v

**Respondent:**

T

**Heard at:** Lincoln Magistrates' Court

**On:** 22, 24, 25 May 2023; & 3 July 2023 (in Chambers)

**Before:** Employment Judge Fredericks-Bowyer  
Tribunal Member Hill  
Tribunal Member Hallam

## Appearances

For the claimant: In Person

For the respondent: Ms G Kennedy-Curnow (Litigation Consultant)

## RESERVED JUDGMENT

1. The claimant's claim that she was treated less favourably because of her sex is not well founded and is dismissed.
2. The claimant's claim that she was sexually harassed on 6 March 2021 succeeds and she is entitled to compensation for that harassment.
3. The claimant's claim that she was sexually harassed on 14 March 2021 does not succeed and is dismissed.
4. The claimant's claim in respect of holiday pay is not well-founded and is dismissed.
5. The matter is listed for a remedy hearing, with directions and notification provided separately.

## REASONS

### Introduction

1. These proceedings were made subject to an anonymity order and restricted reporting order by Regional Employment Judge Swann on 19 May 2023. Those orders relate to the claimant (“G”), the respondent (“T”), the respondent’s managing director (“V”), and the witness for the respondent (“Y”). The restricted reporting order remains in place until the conclusion of the remedy stage of these proceedings, unless revoked earlier by an order. The orders were made because the case contained allegations which relate to sexual conduct. Its purpose is to protect all of the parties to the claim.
2. The claimant was employed by the respondent from 1 January 2020 to 25 June 2021, when she left following dismissal for gross misconduct. We heard the case over 3 days in May 2023. The claimant represented herself. Given the nature of the claim and the dynamics between the parties, there was not enough time to hear closing submissions or reach a decision in the time allowed. Written submissions were filed between the end of the hearing and the Panel’s deliberation day in chambers. This written judgment follows the primary hearing, the written submissions, and a full day of deliberations by the Panel out of public view.
3. These claims arise from events just prior to, during, and after G and V’s break up from a domestic relationship. G alleges that she was treated less favourably than a male employee would, specifically Y, during a disciplinary process after she had an argument with V at work. She also alleges sexual misconduct against V in that (1) he entered the toilet at work whilst she was using it and stared at her using the facilities, and (2) he later approached the toilet door when she was using the toilet and made her fearful that he would enter again, having done so a week earlier. The respondent denies the claim and V strenuously refutes any impropriety in his actions.
4. The claimant represented herself and gave evidence herself in support of her claim. The respondent was represented by Ms Kennedy-Curnow. The respondent’s sworn witnesses were: V and Y. We sat as a panel of three in this hearing. The decision we reached on all of the claims was unanimous and so when this judgment refers to ‘we’, ‘our’, or ‘the Tribunal’, it refers to our collective view. We also had access to an agreed bundle of documents which ran to some 337 pages. Page references in this document refer to the pages of that bundle.

### **Issues to be decided**

5. The case went before Employment Judge Ahmed in a case management hearing on 7 February 2022 and the issues in the case were set from that hearing (pages 39 to 40):-

#### **5.1. Jurisdiction –**

- 5.1.1. *Have all the complaints of discrimination been presented in time? If not is it just and equitable to extend time under the provisions of section 123 Equality Act 2010?*

#### **5.2. Sex discrimination**

5.2.1. *Did the respondent treat the claimant less favourably than it treats or would treat a male comparator in respect of the following:*

5.2.1.1. *Y's conduct on 6 March 2021 [entering the toilet] and 14 March 2021 [being outside of the toilet door]?*

5.2.1.2. *When the claimant made a formal bullying complaint against [Y], V chose not to suspend Y concerned and no disciplinary action was taken against Y?*

5.2.1.3. *V acting in a controlling and harassing manner by controlling and monitoring the time the claimant spent using bathroom facilities?*

5.2.1.4. *Inviting the claimant to a disciplinary hearing which took place on 24 March 2021?*

5.2.1.5. *V carrying out the investigation, failing to carry out an investigation on the claimant and other members of staff?*

5.2.1.6. *V using Y as a witness when the claimant had previously made a complaint about Y?*

5.2.1.7. *V changing the locks to the premises on 17 March 2021 after the claimant's suspension and leaving the claimant's belongings outside of the business premises?*

5.2.1.8. *V allowing [T's] accountant to act as an impartial representative, the same accountant that had allegedly falsified the claimant's payslips after March 2021?*

5.2.1.9. *Delays to the disciplinary and grievance outcome?*

5.2.1.10. *Dismissing the claimant effective on 25 May 2021 for inadequate reasons?*

### **5.3. Sexual harassment**

5.3.1. *Did the respondent subject the claimant to unwanted sexual conduct in respect of the following:*

5.3.1.1. *V unlocked the bathroom door and entered whilst the claimant was using the facility [on or around 6 March 2021]?*

5.3.1.2. *V stood outside the bathroom after monitoring the time the claimant had been using the facility [on 14 March 2021]?*

5.3.2. *Did any such conduct have the purpose or effect of violating the claimant's dignity or create an intimidating, hostile, humiliating or offensive environment?*

5.3.3. *In the circumstances, and having regard to the claimant's perception, was it reasonable for the conduct to have that effect?*

#### 5.4. Holiday pay

5.4.1. *Is the claimant owed any monies in respect of her holiday pay? If so, how much?*

#### Findings of fact

6. The relevant facts are as follows, as we have found them on the balance of probabilities. To find facts on the balance of probabilities, we are making an assessment about whether something is more likely than not to have happened. In other words, if considering whether one of two things happened, we are looking for the one that appears to us to have a greater than 50% chance of being the truth of the matter. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point. When finding these facts, we have considered the documents we were referred to in the bundle, the written evidence in the witness statements, and the oral evidence heard in cross examination.

#### Background

7. The claimant and V were in a relationship from September 2019 to March 2021. V established the respondent during the relationship and the claimant began working for the respondent on 10 January 2020. The respondent is a dessert creating and delivery service. The claimant worked as a bakery supervisor. The claimant describes V's behaviour in the relationship as controlling and damaging to her health. V denies this. We do not consider it relevant to make findings of fact about the nature of the domestic/romantic relationship between the claimant and V. The findings we make are in relation to their working relationship and the things which happened whilst at work.
8. We have heard medical evidence about the claimant's state and health during the time in question, which is linked to her domestic relationship. There were letters in the bundle about the mental health support she has received. Consequently, we find that the claimant was particularly vulnerable during the time period in question and, given the nature of their relationship, we find that V knew about that vulnerability throughout his workplace dealings with her.

#### Claimant and Y

9. V is the managing director, and the only director and shareholder, of the respondent. At the relevant time, the claimant was the bakery/kitchen supervisor and the second senior person in the organisation. Y was one of several members of staff on more casual working arrangements whose job was to assist with the preparation of orders, and with delivering orders to customers. V and Y appear to be friends. Y attended each day at Tribunal in supportive role even after he had spent his short period in the witness stand. Y is saved in V's mobile under a nickname which contains his first name (and so is not repeated here) (page 79), and we find that the pair have a relationship beyond a working one simply from their positions within the respondent. Y no longer works at the respondent and works in plumbing. Prior to this, and after the claimant was dismissed from the respondent, Y was promoted into a more senior role similar to the claimant's.

10. All agree and we accept that there was a less formal atmosphere to the work at the respondent. The claimant says that she was friendly with Y initially and the correspondence between them in the bundle supports this (page 192 to 205). V and Y both used the word 'banter' to describe the work atmosphere. V described how the respondent site is on an industrial site which is isolated during their evening shifts and so it is important to get along. As is common, a less formal atmosphere does not always mean there was a harmonious atmosphere. The claimant gave evidence to the effect that Y did not respect her in the workplace and did not accept her authority.
11. Between 16 February 2021 and 18 February 2021, the claimant was left supervising for periods of time when working with Y. V was not present on site. The claimant says that Y refused to carry out tasks and that he was eating stock, but did not stop when asked to do so. The claimant considered that this was insubordination. She also alleges that Y told her that she had "*fucked up*" and "*made a mess of*" tasks. She says that she told V about this on the phone on the evening of 16 February 2021. Y's witness statements did not address any incidents on these days at all, but Y was contrite that some of his actions in relation the claimant did cause unintended offence for which he was sorry. The claimant mentioned these issues in her grievance e-mail to V of 21 February 2021 (page 78). V does not dispute that he was aware of issues from these days, and so we find that the claimant's account was correct.
12. A similar incident occurred on 19 February 2021. The bare facts of the incident are broadly agreed and we adopt those as the relevant parts of the events. The claimant was working on site with Y, V and another member of staff. The claimant mistook a bucket of waffle mix for a bucket of ice cream mix. Y found this amusing and laughed at the occurrence, telling the claimant (in front of V and another member of staff) that she had "*fucked up*" and was "*stupid*". The parties agree that Y asked V if the claimant "*had even been trained*". The claimant says that other staff members were effectively bullied by Y but that nobody thought telling V would help because Y and V were good friends.
13. The claimant contends that the remarks made by Y were derogatory towards her and that she was the butt of the jokes because she was a woman. In the respondent's defence, V initially took the surprising position that the jokes were made at his expense in that Y was implying he had not trained the claimant properly. V also used scrutinised the language used in the claimant's e-mail about these matters on page 78 to imply that he could not understand the allegations because of the way the claimant had expressed herself in written form. It took some time for V to accept that the claimant was the obvious butt of those jokes, or indeed that he knew fully well what the claimant was complaining about in page 78 because he subsequently engaged with it.
14. In our view, these examples demonstrate V's approach to giving evidence well. Although appearing to be very keen to assist us with openness and clarity, he did not hesitate to attempt to wrong-foot the claimant when she was asking him questions or to make her feel that she was incorrect or confused about things that had happened. V obviously wanted to control the narrative, more so than witnesses

ordinarily would. His head shaking, facial expressions and general body language when the claimant was giving evidence was not impressive.

15. The claimant complained about Y by the e-mail on 21 February 2021 (page 78). V says that the claimant chose to e-mail him at his work address rather than speak to him about it in person, even though it was the evening and they were in the same room when she sent the e-mail. He also says that the claimant then agreed to deal with the matter informally by way of a meeting with Y and V. The claimant denies that she agreed to an informal resolution to her grievance; V put that route upon her, in her view, and she did not resist that route because of the nature of their relationship where V was exerting inappropriate levels of control over her.
16. Y and V spoke about the impending meeting over Whatsapp. An undated series of messages was at page 79. The conversation occurred somewhere between 21 February 2021 and the meeting between the three of them on 24 February 2021. The first message refers to Y seeing V “tomorrow” and so we consider the conversation happened on the evening of 23 February 2021. Y asks whether it would be “an apology sit down meeting”. V responds that the purpose of the meeting was to “clear the air” and “move forward with all of this”. V assures Y that he does not have to apologise. Y responds “yeah fair play mate”.
17. The meeting occurred on 24 February 2021. Broadly, it is agreed that the parties talked about what had happened and Y apologised. The claimant said she considered the matter had been blown out of proportion and said in her evidence that she did think that V had made a bigger deal out of it than it needed to be. This view seems at odds with her claim and what she says about how the grievance was handled. When challenged about this, she said simply that she did not think the grievance should have been handled in that way with that sort of discussion.
18. An account of the meeting, apparently offered by Y, is at page 80. This is a word document and is called “*witness statement of the informal meeting*”. V says it is an e-mail copied and pasted by V into a word document. It is undated. We consider it unusual for this document to have been produced in this way. There is no corresponding statement from the claimant or V, and it was not made clear why Y had produced this ‘witness statement’, or when. The statement supports the respondent’s position about the meeting. The only material disagreement from fact arising from the account is that Y says the claimant bought him a milkshake to apologise to him (he was not sure why she would apologise). The claimant denies buying a milkshake or apologising. We do not consider this a relevant fact to resolve.

6 March 2021

19. The claimant alleges that V entered the toilet at work whilst she was on it, unlocking it from the outside. She says that he looked at her as she sat on the toilet, bare below the waist, and stared before leaving. She says that this was an act done without consent and which left her upset and shaken. She says that this is behaviour, together with other matters which took place out of work, is what led her to end the relationship between her and V. In cross examination, she imitated what she said V did and slightly cocked her head to one side to stare.

20. In the pleadings of the respondent and the witness evidence, V strenuously denies this event occurred and so, logically, the respondent says nothing more about it. There only one point about this issue where the parties agreed: such behaviour was absolutely not a usual feature of their relationship in its normal course. We accept that it would always have been unusual for V to enter the toilet space whilst the claimant was using it. Other than this, there is a direct conflict in the evidence about a discrete event where one party says something happened and the other says it did not.

21. The respondent alleges that the claimant has made up this allegation and that it did not happen. In support of the contention, the respondent asserts that there is no record of the allegation prior to the claimant intimating that she will bring a claim. We were sceptical about the suggestion that the allegation was made up. Under cross examination, the claimant was very upset but was able to relate her evidence clearly and consistently. She pointed to pages in the bundle where she did raise the allegation that V did enter the toilet without her permission. As well as raising it in her grievance, the allegation also appears in the notes of her disciplinary meeting on page 102 (made by the claimant's union representative), and in the agreed meeting minutes on page 128.

22. On page 102, the claimant is recorded as saying (underline for emphasis):-

*"I know how long I've been on the toilet for, it's an invasion of my privacy coming into the toilet... for the last year and a bit I have been here/known you, you have never gone into the toilet to ask another employee..."*

23. V does not respond to the suggestion that he entered the toilet at some point with the claimant in it:-

*"Ok, just going back to state what is on investigation document..."*

24. A similar exchange takes place in the fuller agreed minutes on page 128, where V says:-

*"Just to confirm as per the investigation notes, I was concerned and did not enter the toilet at any period, make that very clear".*

25. The claimant then says, referring back to 6 March 2021: "you have done previously". Instead of denying the very clear allegation, V says:-

*"I'm sorry I don't see how that is relevant to what we are discussing".*

26. It was put to V that this reads almost as an admission. There is no denial and his response appears to accept the claimant's words, albeit noting that they are not relevant to the subject of this work conversation. In cross examination, he explained this by asserting that he wanted to keep the conversation moving along its intended subject, which was the reason for the claimant's disciplinary following the events of 14 March 2021. He felt that the allegation about his conduct on 6 March 2021 was unexplainable but definitely made up by the claimant. We were sceptical that an allegation of this nature was made up. If the claimant wanted to make something up to cause trouble for V, given that the two of them were alone in a toilet at the time in

question, we consider it likely that the allegation would concern far more serious sexual misconduct than it actually does.

27. Overall, we prefer the evidence of the claimant in relation to this issue and find that the events occurred on 6 March in the way she described above. In our view, V's failure to deny the allegation at the time it arose is a critical omission. Instead, he sought to deflect the conversation and change the subject. We consider that this was done to shift the conversation away from a subject about which he was uncomfortable in front of witnesses. A bare denial, which we consider he would have given if his evidence about his reaction to the allegation was accurate, would have prolonged the conversation about the incident and given the claimant the opportunity to add more detail to what happened. Instead, V sought to sweep the issue under the carpet – and succeeded in that meeting.
28. We further find as a fact that the event upset the claimant significantly, causing her to feel hurt and humiliated that this sort of thing could be done without consent in the workplace by her line manager and employer. Having found that upset to be genuinely felt, we must also find that the conduct was unwanted. The respondent asserts that there is confusion over the date of this event. The claimant was initially vague about the date, asserting that it had happened 'previously'. Her claim identifies 6 March 2021 as the date in question. Her written statement identifies 7 March 2021, but she corrected this to 6 March 2021 as she confirmed her evidence. We find the event happened on 6 March 2021 and do not criticise the claimant for being less certain about the date upon which the incident occurred than she was about the incident actually occurring. This is not unusual.
29. The claimant and V split up after this event. The claimant says that their relationship had been poor for some time, but that this event contributed to her realisation that V would not change and felt that he could control her in all ways whether at home or in work. V clearly disagrees with this. Regardless, the pair separated on or in the immediate couple of days following 6 March 2021.

*14 March 2021*

30. On 14 March 2021, the claimant and V were working together at the respondent's unit. Y was working as well, but was coming and going during the evening as he was also making deliveries. Other members of staff were around from time to time, coming and going to take deliveries, but we are satisfied that nobody else saw anything on that evening which forms parts of the relevant facts for our purposes.
31. The claimant and V agree that there was a lull in the orders and so the claimant went into the back kitchen to wash items. On her evidence, she went to the toilet shortly thereafter. She is not sure how long she went to the toilet for, but she knows that she had a message on her phone before she went into the toilet and it was showing as being sent four or five minutes previously at the time V approached the toilet. She then says that V approached the door calling her to see where she was. She said this worried her because she was wary of V. She hurried to wash her hands, and was embarrassed to be in the vicinity of the toilet with him again. She says V had approached the door and that when she opened it, V had his hand on the outside of the door.



32. V tells a different narrative about these events. He stayed in the front kitchen when the claimant went to the back kitchen. He says that the claimant had been missing for around 15 minutes when he went to go and find her, and discovered that she was not in the back kitchen. He says he went to find her because more orders started to come in and the claimant was needed. He says he was unsure where the claimant had gone, and concluded that she was likely in the toilet. He then went to the corridor where the toilet is and called her by her first name to see if she was there. She responded that she was on the toilet and then came out. V says he did not go up to the toilet door. He demonstrated the distance he says he was away in his evidence; he estimates he was never closer than around 1.5m from the door.
33. The parties also disagree about what happened next. The claimant says that V was already angry about her being in the toilet on work time, and told her that it was unacceptable that she was gone for over 15 minutes in the middle of a busy shift. She says she assured him she had been gone for much less time than that and cited the message from a friend as proof that she had not been gone for so long. She says that this made V even more angry, as he had misunderstood her words to have meant that she was messaging friends on work time from the toilet. She admits that she was upset and angry in this situation, feeling that she was being 'gaslighted' about "*something so simple as how long I had been in the toilet*". She also says she felt that she should apologise to V, even though she knew that she had done nothing wrong.
34. V, again, tells a different narrative about this passage of time. He says that he was calm throughout and asked if the claimant was okay. He says the claimant told him that she was fine, but had been on her phone and had not been gone long. He says he told her she should not be on her phone in work time and there were things to be done. He then says that the claimant told him to "*fuck off*". This annoyed him, and he says he told her that was an act of gross misconduct and so she should leave.
35. The claimant denies being asked to leave by V. She says she went back to her work, but there was some tension. She was aware that Y was in the unit by this point. Around 45 minutes later, the claimant says that she hurt her back lifting down some items and so V agreed to let her go home. Just before 10pm that evening, the claimant sent V a message thanking him for letting her go home after hurting herself and asking if she needed to write up a report (page 82). V does not believe that the claimant hurt her back, and does not recall her doing so. He considers that the message is a smokescreen against the claimant's poor conduct that evening and protection against being sent home.
36. Y supports V's and the respondent's case. He says he returned and heard raised voices from the back of the kitchen. He says the claimant was angry and shouting, but V was not. He says that V asked the claimant to go home dozens of times over the next 45 minutes, but that the claimant refused and simply carried on doing her work. He says the claimant then deliberately began throwing stock on to the floor and burning waffles.
37. We find in favour of the claimant in respect of all of the evidence on this issue. We do not place much weight on Y's evidence. He is clearly a friend of V's, attending the tribunal on each day (not just when giving evidence), and is plainly extremely close to V. It does not seem credible to us that V would have remained calm when the

claimant was shouting at him, as Y contends. It also seems implausible that V would be asking the claimant to go home (paid), that the claimant would refuse, and that V would do nothing about that. It is incredible to us that the claimant could have refused to go home in those circumstances if that was her instruction. Similarly, we do not consider that the claimant would have thrown stock on the floor or deliberately ruined orders. Frankly, the claimant's evidence was simply more credible and plausible.

38. Similarly, we prefer the claimant's account about the proximity of V to the toilet door, and the nature of that exchange when she emerged from the toilet. It seems unlikely that anyone would approach a toilet to see if someone is there but then remain so far away from the door. We find that V did take hold of the door as it opened out towards him. We find that V was annoyed at the claimant in that immediate interaction. We do not find that the claimant swore at him, and prefer her evidence that she would have been too scared of his temper to have sworn at him at that time. We find that the claimant did hurt her back and went home as a result. Page 82 is, therefore, a genuine message sent in the hope that V would not remain angry at the claimant going forward.
39. The respondent has produced another undated statement at page 81, ostensibly written by V, which supports the notion that the claimant was disruptive and had destroyed stock. There is a similar document, undated and unsigned (but attributed to Y), on page 91. We considered this evidence but have placed almost no weight on it. They are undated word documents only, and V's mentions some points about the events which V said in his evidence that he had not seen (Y had). There is no record of the notes being produced contemporaneously or sent anywhere for any purpose. They may well have been produced the day before disclosure, for all we know about it.

#### *Claimant's disciplinary and grievance process*

40. The claimant returned to work on 16 March 2021 and was immediately suspended. On the same date, V had the locks for the units changed. There is some dispute about the reasons for this. The claimant says it was to keep her out. V says that it was because the fire door was broken. For reasons which are explained below, we do not consider it relevant to decide this conflict of fact where it is just one word against another. At around this time, V arranged with the claimant for her to collect her belongings. For reasons he could not adequately explain, he then put those items outside in the car park for the claimant to collect.
41. The claimant's disciplinary process was convened on 18 March 2021 with a meeting taking place on 24 March 2021. The notes are at pages 100 to 115. The claimant made some comments on a copy from page 125 to 146. During the course of the disciplinary meeting, the claimant raised issues which form the basis of this claim, in the form of a grievance. The respondent therefore paused the disciplinary process to convene a grievance process. V appointed his accountant to be the grievance manager, realising that there was a conflict of interest in running a grievance process against himself about how he had handled some points.
42. All of the allegations, including the inappropriate toilet usage, were raised with the accountant running the grievance (page 169), but all were dismissed on 21 May

2021 (pages 181 to 183). The claimant was subsequently dismissed on 24 May 2021 for allegedly swearing at V on 14 March 2021.

*The claimant's holidays and pay*

43. The respondent has produced a series of pages in the bundle (pages 309 to 337) which purport to show the holidays that the claimant has taken. This indicates that she has been paid for all of the holidays she took, and that anything outstanding has been paid. There is also some confusion about how much the claimant has been paid over the course of her employment. The respondent says that V made some payments personally to the claimant from his own bank account, which were wages. The claimant says that these were gifts, and points to them being labelled as "birthday money" or "xmas". It is clear that there was some confusion in unravelling what payments had been made to the claimant over the course of her employment.
44. We are extremely suspicious of the respondent's evidence about these issues. The position in respect of the holidays does not make sense to us logically, and V struggled in our view to explain the system to us. However, the claimant has not advanced an alternative case in relation to these points other than to point out the deficiencies with the respondent's evidence. We cannot consider an alternative schedule of holidays or an alternative schedule of work done because the claimant has not provided one.
45. We must therefore consider that, as between the parties, it is more likely than not that the claimant has taken her holidays. This is the only contemporaneous documentary evidence we have. No evidence challenges it and, to the extent that the mathematics appear not to work, we consider that it works very slightly in the claimant's favour as matters stand.
46. We therefore find, as a fact, that the claimant has been paid for all of the holiday she had taken, and does not have any accrued but unpaid holiday left over.

**Relevant law**

*Direct sex discrimination*

47. Section 13(1) Equality Act 2010 provides:-

*"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".*

48. The claimant must establish that she was objectively treated in a 'less favourable' way. It is not sufficient for the treatment to simply be 'different' (Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL). The person(s) with whom the comparison is made must have "no material difference in circumstances relating to each case" to the person bringing the claim (section 23(1) Equality Act 2010). The comparator should, other than in respect of the protected characteristic, "be a comparator in the same position in all material respects as the victim" (Shannon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL). If there is no such comparator in reality, then the Tribunal should define and consider how a hypothetical comparator would have been treated if in the same position as the

claimant save for the fact that they would not have the protected characteristic relied upon (Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA).

49. The phrase ‘because of’ is a key element of a direct discrimination claim. In Gould v St John’s Downshire Hill [2021] ICR 1 EAT, Mr Justice Linden said, in respect of determining ‘because of’:-

*“It has therefore been coined the ‘reason why’ question and the test is subjective... For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a ‘significant influence’ on the decision to act in the manner complained of. It need not be the sole ground for the decision... the influence of the protected characteristic may be conscious or subconscious.”*

50. It is a defence for a respondent to show that it had no knowledge of the protected characteristic relied upon, on the basis that the protected characteristic it did not know about could not have caused the treatment complained of (McClintock v Department for Constitutional Affairs [2008] IRLR 29 EAT). However, this defence does not apply where the act itself is inherently discriminatory (such as differentiation on the grounds of a protected characteristic), and in such cases whatever is in the mind of the alleged perpetrator of the discrimination will be irrelevant (Amnesty International v Ahmed [209] ICR 1450 EAT).

51. Under section 136(2) Equality Act 2010, the claimant needs to show on the balance of probabilities that there are facts from which the Tribunal can decide that direct disability discrimination has occurred. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (section 136(3) Equality Act 2010).

### *Sexual Harassment*

52. Section 26 Equality Act 2010 provides:-

*“(1) A person (A) harasses another (B) if –*

*(a) A engages with unwanted conduct related to a protected characteristic, and*

*(b) The conduct has the purpose or effect of –*

*(i) Violating B’s dignity, or*

*(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*....*

*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –*

*(a) The perception of B;*

(b) *The other circumstances of the case; and*

(c) *Whether it is reasonable for the conduct to have that effect.*”

53. ‘Disability’ is a protected characteristic because it appears in the list of protected characteristics at section 4 Equality Act 2010.

54. Under section 136(2) Equality Act 2010, the claimant needs to show on the balance of probabilities that there are facts from which the Tribunal can decide that harassment related to disability has occurred. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (section 136(3) Equality Act 2010). This means that the claimant will need to show more than simply she was disabled at the time any unwanted conduct occurs (Private Medicine Intermediaries Ltd v Hodkinson EAT 134/15).

55. Harassment claims must be determined by considering evidence in the round, looking at the overall picture. Although the knowledge and perception of the characteristic on the part of the alleged perpetrator is relevant, it is not necessarily determinative (Hartley v Foreign and Commonwealth Office Services [2016] ICR D17). This means that the determination of the words ‘related to’ is a finding the Tribunal should make drawing on all of the evidence before it to account of the possibility, for example, that the alleged perpetrator may be displaying a sub-conscious bias which affects the recipient even if they do not know of the protected characteristic (Tees Esk and Wear Valleys NHS Foundation Trust v Aslan and another [2020] IRLR 495 EAT).

56. Whether or not the harassment is sexual in nature is a matter of common sense by reference to the facts of a particular case (Driskel v Peninsula Business Service Ltd and ors [2000] IRLR 151, EAT). The Equality and Human Rights Commission Code and Guidance gives examples of sexual harassment:

- 56.1. Unwelcome sexual advances;
- 56.2. Touching;
- 56.3. Sexual assault;
- 56.4. Sexual jokes;
- 56.5. Displaying pornographic photographs or drawings;
- 56.6. Sending emails containing material of a sexual nature;
- 56.7. Suggestive looks;
- 56.8. Leering;
- 56.9. Making promises in return for sexual favours;
- 56.10. Sexual gestures;
- 56.11. Intrusive questions about a person’s private or sex life;
- 56.12. Making statements about one’s own private or sex life;
- 56.13. Sexual posts or contact on social media;
- 56.14. Spreading sexual rumours about a person.

57. Determining whether there has been sexual misconduct on the basis of the ‘balance of probabilities’, which is difficult. It is common for parties to be entrenched in polar opposite views. The Tribunal should make positive findings one way or the other,

regardless of its own sensitivity, because it does not help either side for suggestions of improper conduct to be made without an evidenced and reasoned firm conclusion (British Telecommunications Plc v Williams [1997] IRLR 668, EAT).

*Unlawful deduction from wages (holiday pay)*

58. The claimant has the right not to suffer a deduction to her wages under section 13 Employment Rights Act 1996. She is also entitled to have paid time off as annual leave under the Working Time Regulations 1998.

59. As with any claim, the claimant must prove facts which give rise to the claim. She carries that burden. Where the claimant has not proven on a factual basis that she has not been paid for holiday she has not taken, she cannot succeed with her complaint.

**Discussion and conclusions**

*Direct sex discrimination (and jurisdiction)*

60. The claimant complains that she suffered treatment which was less favourable to that which a man would have experienced in her position. The claimant has put forward Y as the comparator, and cited that Y bullied her in front of V but was not dismissed, but that when she argued with V, she was dismissed. She also complains that, when she had a grievance against Y, it was dealt with informally. When V had a grievance issue against her, it was dealt with as a formal disciplinary. The claimant also relies on the facts which give rise to the sexual harassment claim as being acts of less favourable treatment because of sex.

61. We spent some time in the hearing, and time in deliberations, considering (1) what the correct comparator should be, and (2) what impact that assessment has on this claim. The situation is complicated by the claimant's relationship with V. The comparator should be the same as the claimant in all material ways except for the protected characteristic (sex). Y is not the same as the claimant. Y has never been in a relationship with V and, although V and Y have a friendship outside of work, they were not living together and had not needed to navigate the complexity of entangling and then disentangling professional and private relations. We consider Y is not an appropriate comparator to adopt. He and the claimant are not sufficiently similar to be able to judge whether or not the treatment complained of was done on the grounds of sex.

62. In the hearing, we made clear that we were concerned about this issue, and invited the parties to discuss an alternative. This led to the formulation of a hypothetical comparator, who is essentially the claimant but male – a homosexual man, working in the claimant's role, whom had had a sexual and domestic relationship with V. The claimant was unsure about this hypothetical comparator. She did not see how the exercise proved useful, but did admit that V is may have treated that comparator in the same way in respect of the problems with Y and the grievance.

63. In our view, there was no evidence to suggest that V would have acted any differently in respect of the claimant if she were man that he had had a relationship with. This evidential gap reflects what we consider to be the reality of the situation. The acts

done were not direct discrimination on the grounds of sex. They were done because of the relationship between the claimant and V. The claimant's sex is irrelevant other than the bare facts that she is a woman and V has a preference to be in relationships with women. The closest the claimant got, in our view, to articulating sex discrimination was about how V would only be in relationships with women, and would only act in this way with those he was in a relationship with. That claim is not pleaded, and is not in any event a direct discrimination complaint.

64. We found limited facts to be relevant in respect of the grievance and disciplinary process because, again, we do not consider that there has been any differentiation there at all on the grounds of sex. We are satisfied that the respondent conducted a poor process in respect of the grievance and dismissal. It is extremely likely that the process would be considered 'unfair' if the claimant had the standing to make that complaint (although it may have been handled differently if she had had two years' service). However, the claimant's claim is founded on sex discrimination. Where we consider that there has been no less favourable treatment, as we do here, there is No discrimination no matter how poor the respondent process was.
65. In those circumstances, there is no less favourable treatment compared to someone without the protected characteristic. That is the first step in analysing whether this claim could be successful, and so it follows that the claim is not well-founded and must be dismissed.

#### *Sexual harassment*

66. We have found in favour of the claimant on the facts in respect of both events which she complains of as sexual harassment. We found that V entered the toilet without consent, stared at her, and then left on 6 March 2021. We found that that caused upset to the claimant and was unwanted, given the state of their relationship at the time. We deal with our conclusions in respect of this allegation first.
67. Plainly, we consider that this conduct caused the claimant to be upset and humiliated because it was a violation of her dignity. The claimant was sat on the toilet and using it. She had her lower half exposed and her manager, a man, entered the space to look at her without consent. It would be absurd to conclude that the claimant's perception and response to this act was unreasonable. It is plainly reasonable for the claimant to have felt as she did when V committed this misconduct.
68. Is this conduct of a sexual nature? In our judgment, it plainly is. The claimant and V had been in a sexual relationship. The viewing of either one by the other without clothes had been acts of a sexual nature. We view this no differently. Indeed, we consider that this would be conduct, and harassment, of a sexual nature whether or not there had been that relationship history at play. The claimant's intimate parts were exposed and V entered the space to look at her. Consequently, we conclude that V sexually harassed the claimant on 6 March 2021. The harassment occurred within the work place when each were on shift. It is right that the respondent is responsible for that harassment.
69. We also found, on the facts, in favour of the claimant in relation to her second allegation under this claim – that V approached the toilet door whilst she was inside, called through it, and had his hand on the door when she emerged into the corridor.

However, our overall conclusion differs in respect of this part of the claim. The claimant was upset by the events of this day, but in her evidence the claimant's ire was centred around the accusation she had been in the toilet for too long. She did not focus on the impact of V approaching the toilet door when she was asked about this run of events. In our view, the claimant did not feel humiliated or degraded by this conflict. It follows that she was not harassed.

70. In any event, we do not consider that this alone was conduct of a sexual nature on the part of V. Undoubtedly, if he had gone on to enter the toilet as he had done on 6 March 2021, then that would have been sexual misconduct. However, the fact he did not actually empty meant that this run of events concluded prior to that escalation. We do not consider that a person approaching the outside of the toilet door and putting their hand on the handle is likely to be conduct of a sexual nature. In the circumstances of this case, considering the nature of the argument which followed and the subsequent events of the evening, we do not make an exception about that view. It follows that this element of the claimant's sexual harassment fails and is not well-founded and is dismissed.

*Unlawful deduction from wages (holiday pay)*

71. We have been unable to find facts which support this claim. The claimant has not offered us specific dates when she says she was at work but was recorded as taking leave. Whilst we have very real doubts about the accuracy of the respondent's records, we have no alternative picture to compare them to. When she was asked about it on the stand, the claimant said that her former solicitor (not representing at the hearing) had done the calculation and she was unsure how.

72. The claimant bears the burden of proving this part of her claim. She has been unable to do so. It follows that her wages claim is not well-founded and is dismissed.

*Disposal and remedy*

73. The claimant has succeeded on one of her claims, which is that she was sexually harassed on 6 March 2021. All other claims are dismissed for the reasons outlined above. The claimant is entitled to remedy for sexual harassment. Her schedule of loss, and the respondent's position on remedy, is predicated on winning all of the claims. The claimant does not separate her injury to feelings claim across the incidents and so we have heard no submissions about *the injury to feelings flowing from that single incident*.

74. Consequently, there will need to be a separate hearing to determine remedy and the claimant will be asked to give evidence about the impact of this event before we hear representations about it. In closing submissions, the respondent asserted that the claimant's injury to feelings award should not be above the top of the lower Vento band even if she won all her claims. We remark here that we do not consider that approach to be correct where the conduct complained of is so serious and where, as we have found, V knew of the claimant's particular vulnerabilities at that time.



**Case Number: 2601559/2021**

**Employment Judge Fredericks-Bowyer**

21 August 2023

Sent to the parties on:

21/09/2023.....

For the Tribunal Office:

.....