



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mr C Graham**

**v**

**Swansway Garages Limited**

Heard at: **Birmingham**

On: **3, 4, 5, 7 July 2023 (6 July in  
Chambers)**

Before: **Employment Judge Kenward  
Ms Hill  
Mr Liburd**

### Appearances

For the Claimant: **In person**  
For the Respondent **Mr Tunley, Counsel**

## WRITTEN REASONS

JUDGMENT and oral reasons having been given at the hearing on 7 July 2023, with Judgment having been sent to the parties on 7 July 2023, and written reasons having been requested on 10 July 2023 in accordance with rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

### Judgment

1. The Judgment of the Tribunal was that the complaint of harassment (contrary to Equality Act 2010 section 26 was not well-founded and was dismissed.

### Introduction

2. The Respondent is a large company which sells motor vehicles. The Claimant was employed by the Respondent in the capacity of a Salesman from 24 July 2017 until his dismissal on the grounds of gross misconduct with effect from 3 September 2020. The Claimant's case is that during his employment he was subjected to derogatory comments which he argues amounted to harassment on the grounds of sexual orientation.

### Proceedings and issues

3. An ACAS certificate was issued on 29 November 2020 in respect of early conciliation which began with ACAS being notified of the prospective Claim on 29 October 2020. Proceedings were commenced on 1 December 2020 by an



ET1 Form of Claim in which the Claimant complained of discrimination on the grounds of sexual orientation.

4. The Claimant completed box 8.2 of the ET1 Form of Claim setting out the details of his Claim. The first paragraph stated that *"I worked for Swansway Garages and was subjected on a daily occurrence that my sexual orientation/preference was that of children over a 3 year period"* and *"I was called pedo, kiddy fiddler, and had the following comments said to me by my line manager Jon Gill"*.
5. A list of ten alleged comments then followed. The alleged comments were all suggesting that the Claimant had committed sexual acts involving children or had a sexual interest in children (including his own daughter and son). In setting out the details of his Claim, the Claimant did not refer to anyone else other than Jon Gill having made any comments. No dates were given for the comments.
6. The final sentence of section 8.2 of the ET1 Form of Claim sought to explain that *"I have for ten years worked at Liverpool One, Dobbies Garden Centre, the Trafford Centre and for the last 3 years Knowsley Safari Park and play the role of Father Christmas"*. His case is that it was finding out about his role as Father Christmas that caused Jon Gill to start making comments to the effect that the Claimant was a paedophile. Jon Gill now accepts that he made comments to this effect and sought to explain them as part of the *"banter"* which existed within the workplace.
7. At section 9.2 the Claimant completed the box in relation to compensation in the terms set out below.

*"Upper band for discrimination £26,300 to £44,000. The daily abuse which lasted for 3 years about my sexual preferences/orientation has destroyed my life"*.
8. It is to be noted that the Claimant's Schedule of Loss seeks to justify the figure being claimed for injury to feelings on the basis that this *"is the most horrific abuse anyone has ever suffered in UK employment history"*. While it is not in dispute that the alleged abuse was vile and disgusting, this perhaps indicates the degree of hyperbole to which the Claimant is prone.
9. The Grounds of Resistance submitted by the legal representatives for the Respondent on 15 January 2021 consisted of four short paragraphs. The brevity was effectively justified at paragraph 1, on the basis that the Respondent *"denies each and every allegation contained in the ET1 Form of Claim as if the same were herein set out and traversed seriatim"*, with a similarly general denial being repeated at paragraph 4. The denial would seem to be at odds with the evidence subsequently adduced by the Respondent from Jon Gill. However, paragraph 2 contended that, in any event, the ET1 Form of Claim did not disclose any of breach of the Equality Act 2010 so that the case should be struck out as the Tribunal had no jurisdiction to hear the Claim. The only factual information pleaded appeared in paragraph 3 which asserted that the Claimant had been



dismissed for assault and as he *“clearly accepts that the dismissal was fair”* (which may have been a reference to the fact that the ET1 Form of Claim made no complaint of unfair dismissal) *“he is trying to circumvent the intentions of Parliament by bringing a spurious claim of “purported” discrimination”*.

10. The Respondent subsequently made an application to strike out the Claim. The case initially came before Regional Employment Judge Findlay on 20 July 2021. Her subsequent case management summary describes the basis of the Respondent’s application as being that *“whether an individual male or female is subjected to abuse suggesting that they are a paedophile by fellow employees in the workplace is not something that is protected by the Equality Act 2010”* and would not amount to discrimination on the grounds of sexual orientation. Regional Employment Judge Findlay commented that *“it seemed to me that the claimant may struggle to show that being called a paedophile (or words to that effect) amounts to discrimination falling within the definition of sexual orientation (although there may be an argument that what the claimant describes in his claim form, if true, amounts to harassment related to sexual orientation”* but, having *“read the claim form, however, and in particular box 8.2 it seemed to me that the facts pleaded may more properly be considered, if correct, to amount to sexual discrimination (including harassment) related to sex”*. She suggested that it *“seemed to me that this is obvious because some of the allegations could only be addressed to a man, but also because the claimant’s case is that he received this abuse because of undertaken the role of Father Christmas (i.e. a male role)”*.
11. Regional Employment Judge Findlay’s case management summary then records that, having explained to the Claimant that she thought that his allegations may more properly be seen as some form of sex discrimination, he might wish to consider amending his claim to add a complaint of sex discrimination based on the allegations already set out in section 8.2 of the ET1 Form of Claim. This seems to have prompted the Claimant to state that he also wished to amend his claim to add a complaint of unfair dismissal on the basis that *“he reacted to the abuse alleged in paragraph 8.2 when another employee suggested that he was a paedophile in front of a member of the public, and this had led to his dismissal”*. Regional Employment Judge REJ Findlay made the point that there was no suggestion of any complaint of unfair dismissal in the ET1 Form of Claim. In this regard, it can be seen that the details of the Claim set out at section 8.2 made no reference or the Claimant being dismissed or the comments of the other employee.
12. The case was subsequently listed for a preliminary hearing to consider the Claimant’s application to add complaints of sex discrimination and unfair dismissal, and the Respondent’s striking out application. This resulted in Employment Judge Dimblylow rejecting both the Claimant’s application and the Respondent’s application in a Judgment for which written reasons were given on 15 November 2021. In refusing permission for the Claim to be amended,



Employment Judge Dimbylow had considered the applicability of time limits, for which purposes the Judgment records that the Claimant *"told me that he had no idea about time limits"* although the Judge noted that the Claim Form was presented very shortly before the end of the primary limitation period, and he was surprised that the Claimant was not told about time limits when using the services of ACAS in early conciliation. Employment Judge Dimbylow also recorded that the Claimant advanced the argument that his mental health issues had caused some confusion and distress when he filled the Claim Form in online and he had thought that he had ticked the box for unfair dismissal, although he had not. It is to be noted that this is an explanation which does not really explain not mentioning anything about the dismissal (or the comments which he claimed was a provocation for the alleged assault) in section 8.2 of the ET1 Form of Claim.

13. It is also to be noted that Employment Judge Dimbylow described the Claimant as articulate and intelligent but *"not always a good witness in his own cause"* in that he was *"prone to exaggeration"* as was apparent in the way in which he valued his injured feelings in that, in a medical report dated 14 October 2021, he had described many life events which had probably have taken a toll upon his feelings and mental health; but he had founded his Claim on the basis that the feelings and mental health problems outlined were entirely due to the Respondent.
14. In rejecting the striking out application, Employment Judge Dimbylow stated that *"I cannot agree with the respondent's submissions that the facts advanced cannot as a matter of law amount to harassment related to sexual orientation"* and noted that *"the key words are "related to" found in the definition of harassment in section 26 of the (Equality Act 2010)"* although the rest of his reasoning was to the effect that a factual analysis was required into whether the conduct complained about was unwanted, and had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.
15. The Respondent did seek to appeal against the decision of Employment Judge Dimbylow. The appeal was dismissed as a preliminary stage by the Employment Appeal Tribunal from which we deduce that the EAT was at least satisfied that the Claim was not misconceived in law.
16. The Case Management Order of Employment Judge Dimbylow set out the issues to be determined by the Tribunal at the final hearing and made it clear that if either party considered that the List of Issues was wrong or incomplete, then that party *"must write to the tribunal and the other side by 4pm on 3 November 2021"*.
17. The List of Issues identified the conduct alleged to amount to harassment related to sexual orientation as being as set out below.

(1) *"Daily" use of verbal abuse from 1 September 2017 until 8 August 2020 by JG*", and



(2) “Use of verbal abuse on 8 August 2020 by S (last name not known)”.

18. In relation to the issue of the alleged abuse by Jon Gill, the List of Issues is not specific as to the actual words used or the dates of any abuse. In the circumstances, the Tribunal has had to refer back to the ET1 Form of Claim for the detail of the complaints as to the words alleged. In so far as the dates were stated to be between 1st September 2017 and 8 August 2020, 1 September 2017 appears to be a date about six weeks after the Claimant had started his employment. The Chronology produced by the Claimant has the abuse beginning in August 2017. The significance of 8 August 2020 as the last day of any alleged abuse is that this is the date on which the Claimant was suspended, although the Bundle does not seem to provide any document which confirms this. However, this is the date for the Claimant’s suspension in the Respondent’s Chronology which has not been challenged. As such, 8 August 2020 became the Claimant’s last date in the workplace other than later attendances as part of the disciplinary process. Although reference is made to the abuse being “*daily*”, any verbal abuse effectively ceased period between 23 March 2020 and 21 June 2020 when the Claimant was not in the workplace because of the lockdown brought about by the 2020 pandemic.
19. In so far as the List of issues identified the conduct alleged to amount to harassment related to sexual orientation as including the use of verbal abuse on 8 August 2020 by S (which is a reference to an employee called Stefan Strugaru) this appears to be an allegation which was not made in the ET1 Form of Claim and the List of Issues does not identify the actual words alleged to amount to verbal abuse. However, the List of Issues is precise as to the date of the abuse which is stated to have been 8 August 2020, so that any abuse which is being alleged would be any alleged abuse on the date that the Claimant was suspended.
20. It is also to be noted that the conduct in issue is that of verbal abuse rather than any other form of abuse. However, the evidence in this case is that of a toxic culture where another parallel forum existed, namely a WhatsApp group, where employees also traded vile abuse, with the Claimant being one of the main culprits responsible for some of the vilest abuse.

### **Evidence**

21. In addition to listing the case for a final hearing, Employment Judge Dimbylow also made directions for disclosure of documents and the production of a bundle of documents for the final hearing. As a result, we were provided with a bundle of 300 pages containing the documents disclosed by both parties.
22. Directions were also made or witness statements to be provided. The Claimant originally provided a rather brief statement of some 3 pages dated 22 December 2021 which repeated some of the alleged comments whilst also seeking to



describe the impact of the alleged comments on him and commenting on the case.

23. The Claimant was subsequently directed, by 7 March 2022, to provide a Chronology of the acts of discrimination and a Statement of Evidence setting out the alleged acts of harassment related to sexual orientation and the dates, and what was said and by whom. With the final hearing listed for 1 August 2022, the Claimant had still not complied with this direction when an Unless Order was made on 12 July 2022 requiring compliance by 19 July 2022. After a short extension, the Claimant complied with the unless order on 20 July 2022.
24. This involved the Claimant, really for the first time, putting dates on various alleged comments and other incidents. The document which he produced is described as both a Chronology and a Statement. It contains a heading for each month from August 2017 until the end of his employment and provides a detailed commentary of events each month, although the first sentence in relation to each month is often to the effect that the same comments continued to be made so that, for example, the contents of the statement for March 2019 begin by stating "*the abuse about being a kiddie fiddler, paedo and sexual predator continued*". Insofar as the entries for some of the months then provided detailed in relation to particular incidents or comments, the Claimant, who confirmed that he did not keep a log or anything like that, has never really adequately explained how he was able to produce such detail and date the various alleged events, in July 2022, when it seemed that he had not previously been able to do so.
25. The Respondent accepted that Jon Gill was an individual who had made vile and disgusting comments to the Claimant and other employees, with Jon Gill, seeking later to explain in such comments on the basis that they were intended to be humorous. The Respondent's position, which was the basis upon which Mr Tunley cross-examined the Claimant on the content of his written evidence, was that the Claimant's written account involved significant exaggeration and he had sought to embellish his story.
26. The Claimant did rely upon Statements of Evidence from two former employees of the Respondent, Robert and Marc Crosbie (father and son) who did confirm that Jon Gill subjected the Claimant and other employees to abuse. Both of these witnesses attended the hearing (remotely) to confirm their evidence. Thus, the written evidence of Marc Crosby confirmed that Jon Gill would sit in his office and hurl abuse at the staff in the office passing it off as "*banter*". He described the nature of the abuse as "*always sexual and commonly referred to children being molested, more specifically he denoted that Carl was a paedophile because he enjoys his role as Father Christmas and therefore molested children including his own*". He also described similar comments being made to himself and his father and another employee called Oliver Robinson. The evidence of Robert Crosbie was to similar effect. Both these witnesses had left the Respondent's employment before the Claimant, so that Robert Crosbie was only able to confirm



the position up to approximately June 2018 when he left, and Marc Crosbie was only able to confirm the position up to February 2020 when he left. The evidence of Marc Crosbie was that he left *“as a result of the abuse I witnessed at the hands of Jon Gill”*.

27. The Respondent had served Statements of Evidence from four witnesses, from whom the Tribunal also heard oral evidence.
28. Jon Gill had produced a Statement dated 21 January 2022. By this time he had seen the Claimant’s brief first Statement and those of Marc and Robert Crosbie. He did not seek to dispute the comments attributed to him. He sought to explain his comments on the basis of the Claimant’s role as Santa Claus having caused him to consider that the Claimant had an unhealthy interest in children. As such, he denied that his comments had involved saying anything about the Claimant’s sexual orientation. He stated that *“I never accused the claimant of being gay or bisexual, or for that matter heterosexual or trans”*. Whilst accepting that his conduct had been unacceptable and apologising for it, he explained that, *“at the time I saw this as office banter, I now realise that this behaviour was unacceptable”*. This was in contrast to his position when the allegations of having called the Claimant a paedophile were first raised by the Claimant in a grievance after his dismissal, as Jon Gill had denied, when interviewed on 4 November 2020, ever having called the Claimant a paedophile. However, by the time of the disciplinary hearing on 17 November 2020 he had explained that he had originally lied because he had *“panicked”*. His Statement exhibited various text messages that he had exchanged with the Claimant which suggested that they initially remained on good terms even after the Claimant’s dismissal.
29. Jon Gill then provided a second Statement of Evidence in response to the Claimant’s detailed Statement and Chronology from July 2022. In so far as the Claimant was now making extra claims regarding Jon Gill’s behaviour, he said *“by no way am I able to recollect such behaviour occurring to the degree he mentions”*. In accepting that there had been *“banter about (the Claimant) being a paedophile”*, he sought to explain this *“in the context of daily banter and joking within the workplace”* which *“was a part of culture within the Used Sales Department”*, with the Claimant and others *“all giving as good as they got”*. He exhibited to his Statement 14 pages of WhatsApp messages which appeared to show the Claimant posting numerous offensive comments, a large number of which were homophobic. Some were derogatory about Romanian people or involved offensive comments in relation to child abuse.
30. The Respondent also provided Statements of Evidence from David Cowan, who dealt with the disciplinary hearing which resulted in the Claimant’s dismissal for having assaulted a work colleague, from Ben Gilbert, who dealt with the disciplinary appeal, and from Donna Winrow, who sought to comment on the case in her capacity as the Respondent’s head of HR. These witnesses also attended and gave oral evidence.



## Findings of fact

31. The Claimant commenced employment on or about 24 July 2017. His contract of employment made reference to disciplinary and grievance procedures. The grievance procedure was set out in an employee handbook. The Claimant was aware that, if he was aggrieved about his treatment at work, he could bring a formal grievance.
32. During various periods of the Claimant's employment, a WhatsApp group, which had been set up by Jon Gill, was in existence, and involved Jon Gill, the Claimant and other colleagues posting various messages, many of which were offensive unacceptable. A selection of messages from the WhatsApp group appear in the Bundle or were exhibited to the Statements of Jon Gill. Some of the messages involved the claimant and Stefan Strugaru exchanging insults. It is not always clear whether the various messages were intended to be taken seriously or were in jest, but either way the content was completely unacceptable.
33. On 8 August 2020, an incident took place in which the Claimant assaulted Stefan Strugaru. The Tribunal is satisfied that this was clearly an assault and it was inevitable that it would be dealt with as gross misconduct.
34. An investigation interview took place on 20 July 2020. This seems to have been a second investigatory interview, because the notes of the meeting refer to a previous meeting or conversation. The Tribunal has not seen any notes from any such previous meeting. It had emerged that part of the possible background to the incident between the Claimant and Stefan Strugaru was that of the messages which had been exchanged on WhatsApp. As part of the investigation, Sam Farrington, the HR adviser conducting the meeting, was seeking to see the WhatsApp exchanges in their entirety as "*we had only seen snapshots of the conversation*". Sam Harrington was being told, including by the Claimant, that the messages had been deleted. Despite this, at various points during the proceedings, the Claimant seems to have been able to produce screenshots from the WhatsApp group, or invite the Tribunal to view messages from the WhatsApp group on his mobile phone. The Tribunal concluded that the Claimant had probably been deliberately misleading Sam Farrington when he responded to the request being made to see any WhatsApp conversation in its entirety, by suggesting that the messages had been deleted.
35. In the interview, the Claimant sought to justify or explain the assault on the basis that, on the previous day, which would have been 7 August 2020, Stefan Strugaru had "*called me a paedophile and that I don't like to f\*\*\* young girls but boys*", with it being suggested that these alleged comments had apparently been made in describing the Claimant to a driver visiting the Respondent's premises. The Claimant stated that these comments had "*pushed me over the edge this time*" and he had put a "*threat on WhatsApp group*". The Claimant also seems to have





raised the issue with Jon Gill, of seeking to stop such comments from Stefan Strugaru.

36. The Claimant had then sought to explain the altercation which had taken place on the following day (which would be 8 August 2020) between himself and Stefan Strugaru, on the basis that Stefan Strugaru had said that he was going to go to Jon Gill and get the Claimant into trouble and Jon Gill had then shouted (presumably at the Claimant) that *“you have cost me £400”*, at which point, according to the Claimant, Stefan Strugaru was smirking. The issue seems to have been as to whether someone was responsible for having checked (or not checked) for damage to vans, and as a result of what he was told by Stefan Strugaru, Jon Gill was blaming the Claimant.
37. The Claimant then explained in the investigatory interview that *“I walked around for 5 or 10 minutes trying to calm down”* and *“I then went in, my hands were on either side of his head”*. He was asked if he had his hands on him once only, and replied *“I said if you speak to me like that I am going to fu\*\*ing kill you ... horrible fu\*\*ing c\*\*t, and then “I grabbed him the second time”* after which Stefan Strugaru *“said he was going to HR”*.
38. It is to be noted that, during the course of this interview, the Claimant did not raise any issues regarding the alleged verbal abuse that he was receiving from Jon Gill as being the root of the problem.
39. After the interview, the Claimant seems to have emailed a note to Paula Mobsby, the notetaker from HR, regarding the notes of the interview. This makes it clear that the verbal abuse was on the day before the incident. It further suggests that the assault occurred when the Claimant *“lost it”* as a result of Stefan Strugaru goading him and smirking behind Jon Gill’s back after Jon Gill had suggested that the Claimant had cost him £400. There is no reference to Stefan Strugaru having said anything at this stage other than, once the Claimant had threatened him, he said *“look there is Jack he has witnessed you threatening me I’m going to HR”* which prompted the Claimant to lose further control and *“put my hands on Stef’s head and screamed obscenities at him”*. Although the three pages of this note from the Claimant sought to clarify various issues, and sought to explain the exchanges in the WhatsApp group *“by me and everyone else”* which *“was disgusting, brutal, vile, very personal and degrading”*, there was no reference to any alleged verbal abuse by Jon Gill being of any relevance to the situation .
40. Stefan Strugaru was also interviewed. He confirmed that the threat which the Claimant had put on the WhatsApp group was that *“he was going to kill me”* although he seems to have assumed that this was a joke. He described the events prior to this (which would have been on 7 August) as involving the Claimant having described him to the driver as an *“unhelpful Romanian”* which caused him to get upset and resulted in him referring to the Claimant as *“the one that likes to play with kids”*.



41. It is noteworthy that the Claimant's first Statement contained no reference to the alleged verbal abuse by Stefan Strugaru or the subsequent altercation and assault on the following day (perhaps consistent with the omission of these events from the ET1 Form of Claim). However, the Claimant's Chronology / Statement refers to the abusive comments alleged to have been made by Stefan Strugaru but seems to be vague, perhaps deliberately so, as to the date of the comments, in that the Statement leaves it unclear as to whether the abusive comments were on the same day as the assault or the previous day. However, the earliest versions of events clearly refer to the abuse having been on the previous day, which would have been 7 August 2020, and the Tribunal has concluded that this is the most likely date.
42. Given the Claimant's tendency to exaggerate and embellish when he considers it to suit his case, and given that Stefan Strugaru would have had less reason, when interviewed, to seek to give a different impression as to what had happened from that which had happened, the Tribunal has concluded that it is more likely that any verbal abuse which took place on 7 August 2020 was as described by Stefan Strugaru, namely that he was responding to derogatory comments which referenced the fact that he was Romanian by referring to the Claimant as "*the one that likes to play with kids*".
43. Similarly, given that the Claimant had an incentive to seek to minimise the seriousness of his actions, the Tribunal has concluded that it is more likely that any physical contact was as described by Stefan Strugaru. His description was to the effect that the first time the Claimant grabbed him by the head he stated that he was "*going to kill me*" and the second time he grabbed him he "*banged my head on door repeatedly*" and said that he had "*more coming your way*".
44. Following the investigation, a disciplinary hearing took place on 3 September 2020 with the hearing being conducted by David Cowan. The Claimant's case was that although he had grabbed Stefan Strugaru twice, by the head and face, but he had not hit Stefan Strugaru. However, he admitted that his actions amounted to assault. He was asked as to any mitigating circumstances and referred to the issue in respect of the two vans being checked, with this being the provocation which had "*put me over the edge and push me too far*". He referred to having previous "*history*" with Stefan Strugaru, and there was some discussion as to the messages in WhatsApp group, but no issues were raised in respect of his treatment or any verbal abuse by Jon Gill.
45. The decision of David Cowan was to dismiss the Claimant on the grounds of gross misconduct. This was both in relation to the allegation of assault and the WhatsApp messages which the Claimant had sent and which he admitted to be "*vile*".
46. The Claimant appealed against his dismissal. His grounds of appeal stated that "*I know in the HR world this is classed as assault and reasonable grounds to*



*dismiss me*” but he sought to rely upon the mitigation of Stefan Strugaru having “*verbally assaulted me*” the previous day (rather than the previously suggested provocation of Stefan Strugaru having caused Jon Gill to blame him for the issue in respect of the cost of damage to vans).

47. The Claimant’s appeal hearing was heard by Ben Gilbert on 22 September 2020. The Claimant’s strategy in the appeal hearing was to try and create an unfavourable impression of Stefan Strugaru who was “*not a nice man*”, who had caused Mark Crosbie to leave the Respondent (contrary to what Marc Crosbie was to say in the Statement he provided for the Claimant within the Tribunal proceedings) and who had pushed the Claimant too far the previous day and the following day had been “*pushing me again*”. However, the Claimant now seemed to be suggesting (although it was far from clear) that it was on the following day (which would be 8 August 2020) that Stefan Strugaru had said “*that I was a paedophile, and that I f\*\*ked little boys*”, and this had caused the incident in that the Claimant had “*walked over to him and said if you say anything else like that, I will rip your head off*”. Stefan Strugaru had apparently laughed and said that he had a witness and would go to HR at which the Claimant said he “*lost it, grabbed him*”. This was inconsistent with the Claimant’s earlier explanation (see above) which had suggested that the immediate cause of the Claimant assaulting Stefan Strugaru was the issue in respect of the damage to the vans.
48. It can be seen that the Claimant’s explanation as to what had provoked him, and the date of any verbal abuse regarding being a paedophile, had changed between the disciplinary hearing and the appeal hearing. It had gone from the verbal abuse being on the previous day and the provocation being the issue over checking the vans, to the provocation being that of the verbal abuse and the verbal abuse having taken place on the day of the assault. As stated, the Tribunal thinks it is more likely that the verbal abuse was on the day before assault, since this was the sequence of events originally provided by the Claimant, but the various different versions of events have caused the Tribunal to conclude the Claimant is not a reliable historian and is capable of devising a narrative to suit the purposes for which it is being put forward. Further inconsistency as to the cause of the alleged provocation arises from the Claimant’s Chronology / Statement as, by that stage, there was no reference to the issue of the damage to the vans.
49. The Claimant’s appeal was dismissed by Ben Gilbert by letter dated 29 September 2020.
50. During the course of the disciplinary investigation and subsequent disciplinary and appeal proceedings, the Claimant was still exchanging regular text messages with Jon Gill. He was seeking to persuade Jon Gill to get involved on his behalf. It seems clear from the text messages that they still had a good relationship.



51. However, following the appeal, the Claimant seems to have submitted a document which was ultimately treated as a grievance. The narrative now being put forward in this document seemed to be seeking to emphasise that his actions, which had been described as disproportionate and excessive, were as a result of the verbal abuse by Stefan Strugaru, with reference also being made to offensive comments made on WhatsApp. The main focus though was on the suggestion or abuse to the effect that he was a paedophile with the Claimant clearly interpreting references to a paedophile as being to an adult male who has sex with young boys. In due course, the Claimant seems to have gone on to interpret references to being a paedophile as amounting to harassment related to perceived sexual orientation. However, he felt that it was necessary to explain the circumstances in which Stefan Strugaru had come to call him a paedophile, namely that this was something that Jon Gill had been calling him for the last three years. In the grievance document he set out a list of ten comments alleged to have been made by Jon Gill. This is a very similar list to that contained in the ET1 Form of Claim which he was to submit a couple of months later, in that the first eight alleged comments at section 8.2 of the ET1 Form of Claim also appear, in the list of ten alleged comments, using the same words, and in a very similar order. Reference is then made to the other two items in the list at section 8.2 of the ET1 Form of Claim. It is noteworthy that much of the other details which were later to appear in his Chronology / Statement do not appear in this grievance document even though the grievance document was ten pages in length. It is also noteworthy that, apart from dating the comments written on the photocopy of his CRB certificate to October 2019, no dates are provided for any of the alleged abuse. The reference to October 2019 is inconsistent with the Chronology from 2022 which assigns these alleged comments to October 2018. The document ended with a threat, namely that if he did not hear from one of the directors by 13 October 2023, he would forward his evidence to ACAS.
52. The document was treated as a grievance, which was duly investigated, involving a grievance meeting with the Claimant on 22 October 2020. The Claimant did not provide significantly more detail regarding his allegations about Jon Gill, but did explain that other employees were subjected to similarly offensive comments. Essentially, the Claimant was describing himself as the “scapegoat” for the culture of unacceptable language and banter which had existed in the workplace for which he considered Jon Gill was responsible. His previous failure to raise this was because Jon Gill “works my wages out”.
53. The Respondent has subsequently suggested that the purpose of raising these matters at this point in time was as leverage in seeking to get his job back or get a pay off from the Respondent. The Tribunal agrees. The end of the grievance document had stated that, if he did not hear from the directors he would forward his evidence to ACAS. At the beginning of the grievance interview he made it clear that he wanted his job back. When it was made clear that overturning the appeal decision was outside the scope of the grievance process, the Claimant



sent an e-mail dated 23 October 2020 in which he was threatening that he would go to ACAS and the Respondent would be ridiculed in the national press if it did not resolve the matter to his satisfaction. When an early reply was not forthcoming he e-mailed the Respondent on 26 October 2020 stating that "*I am conscious that the 3 months from dismissal is looming and early conciliation will be ruled out so can you please respond*". This would seem to be inconsistent with the Claimant having told Employment Judge Dimbylow that he had no idea about time limits.

54. Jon Gill was interviewed as part of the investigation. In the course of this interview he denied ever having called the Claimant a paedophile. It is now clear this was untruthful. In a subsequent disciplinary hearing, he accepted that he had originally lied. The decision letter concluded that he had failed in his responsibilities in upholding and maintaining appropriate levels of behaviour within the team and had actively participated in and failed to prevent the continuing inappropriate behaviour. He was given a final written warning on the basis of his remorse and previous unblemished record.

#### **Relevant law**

55. In relation to discrimination and harassment complaints, Equality Act 2010 section 123(1)(a) provides that "*a complaint ... may not be brought after the end*" of ... "*the period of 3 months starting with the date of the act to which the complaint relates*" or "*such other period as the employment tribunal thinks just and equitable*". Equality Act 2010 section 123(3)(a) provides that "*conduct extending over a period is to be treated as done at the end of the period*" and section 123(3)(b) provides that "*failure to do something is to be treated as occurring when the person in question decided on it*".

56. Harassment related to sexual orientation, contrary to Equality Act 2010 section 26, is defined as being where a person (a) engages in unwanted conduct related to a relevant protected characteristic, namely sexual orientation and (b) the conduct has the purpose or effect of violating the other person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the other person.

57. In deciding whether the conduct has the effect referred to at (b) immediately above, Equality Act 2010 section 26(4) states that each of the following must be taken into account:

- (a) the perception of the person alleged to have been harassed;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

58. Where the relevant protected characteristic is, as here, sexual orientation, the provisions of Equality Act 2010 section 12(1) apply and define sexual orientation as "*a person's sexual orientation towards*



- (a) persons of the same sex,
- (b) persons of the opposite sex, or
- (c) persons of either sex”.

59. Guidance as to the approach to be adopted by the Tribunal to considering whether the conduct complained of was related to the relevant protected characteristic (namely sexual orientation in the present case) was provided by the Employment Appeal Tribunal in the case of Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT, at paragraphs 24 and 25, as below.

*“However ... 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 ... 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”.*

60. The Tribunal was also notes the commentary in ‘Harvey on Industrial Relations and Employment Law’ at paragraph L426.01 as set out below.

*“Even under the broader definition of ‘related to’, misbehaviour at work - even when it might properly be described as brutal or malicious - will not necessarily fall into the camp of unlawful harassment; it must still be ‘related to’ a relevant protected characteristic. Ultimately, the protection is against harassment that is, itself, a form of discrimination. Bullying is, of itself, not discrimination, except in the unhelpful sense that involves treating some individuals differently to others. The intention of the legislation is to give effect to the principle of equality. It is no part of the principle of equality that antisocial behaviour in the workplace per se should be punished, however unacceptable that behaviour might be in itself”.*

## **Conclusions**

61. In conclusion, the Tribunal turns to the issues to be determined as set out in the List of Issues.



62. *“Did the Respondent do the following things:*

*2.1.1 daily use of verbal abuse from 1 September 2017 until 8 August 2020 by Jon Gill”.*

On the basis of the findings of fact set out above, the Tribunal accepts that the Claimant was verbally abused by Jon Gill between September 2017 and August 2020. The Tribunal was not satisfied that the abuse was daily. In addition to the obvious point that it clearly did not continue during the period when the Claimant was absent from work as a result of the first lockdown, ultimately, the Tribunal has concluded that the Claimant is prone to exaggeration and describing the abuse as daily probably amounts to an imprecise description of the frequency of the abuse, but the Tribunal does accept that it was happening on a regular basis,. It is to be noted that there is no evidence of any abuse from Jon Gill on 8 August 2020, which is the last day of the period, but Jon Gill did accept, when questioned by the Tribunal, that the abuse would have taken place in August 2020.

*“2.1.2 use of verbal abuse on 8 August 2020 by Stefan Strugaru”.*

In the light of the findings set out above, the Tribunal does not accept that there was any verbal abuse of the Claimant on 8 August 2020 by Stefan Strugaru. Any abuse had taken place on 7 August 2020 with the words used being those admitted by Stefan Strugaru, namely that he referred to the Claimant as *“the one that likes to play with kids”*.

63. *“If so, was that unwanted conduct?”*

The Respondent accepted that there was a culture of vile and abusive comments, which involved the Claimant being called a paedophile. While the Claimant himself was clearly a part of that culture, the Respondent accepted that it was not unreasonable to conclude that the conduct was unwanted in that, although the Claimant was happy to say vile and disgusting things about other people, having other people saying vile and abusive things about him was unwanted. The evidence of Robert Crosbie suggested that the Claimant was less than happy with the things that he was being called by Jon Gill, and that there was a discussion about raising matters with David Cowan, although the Claimant ultimately did not do so. It also seems strange that, when he was the recipient of comments which were, from his later reaction, unwanted, from Stefan Strugaru, on 7 August 2020, the Claimant actually seems to have raised the issue with Jon Gill, of seeking to stop such comments from Stefan Strugaru.

64. *Were the comments related to the Claimant’s sexual orientation?*

This is the issue at the heart of this case. In relation to the verbal abuse by Jon Gill, there is no contemporaneous record of the precise words said. Jon Gill himself, rather conveniently, was unable to deal with the detail of any questions as to what was said, on the basis that he could not recollect. The Tribunal similarly found that the Claimant was an inaccurate and unreliable historian who



had sought to reconstruct a narrative retrospectively. The Tribunal asked itself the question which the case law guidance referred to above required the Tribunal to ask itself. Was there some feature or features of the factual matrix identified by the Tribunal, through its findings of fact, which properly leads it to the conclusion that the conduct in question is related to sexual orientation, and in the manner alleged by the Claim?

65. This in itself gives rise to a difficulty, as the Claimant in his Claim Form and in his evidence, does not himself really articulate the basis upon which the comments might be alleged to be related to sexual orientation.
66. As far as any explanation is given in the Claim Form, the Claim Form links the comments to the Claimant's seasonal work as a Father Christmas. But this does not cause the comments to be related to sexual orientation, As Regional Employment Judge Findlay suggested, this might cause there to be some gender basis to the comments, in so far as Father Christmas is a male.
67. In his grievance document, the Claimant was clearly associating being a paedophile with being a male of a homosexual sexual orientation. He describes a paedophile as someone male who has sex with young boys. Clearly this involves applying an incorrect and homophobic meaning to the word "*paedophile*". Calling someone a paedophile is not related to his or her sexual orientation, because a paedophile could be someone whose sexual orientation was towards persons of the same sex or persons of the opposite sex or persons of either sex.
68. In his cross-examination of Donna Winrow, the Claimant had sought to articulate the argument that the comments must relate to sexual orientation because they were comments about sex. Again, this misunderstands the meaning of the words in use. The fact that the comments may refer to the act of sex, and that someone having sex will be of a particular sexual orientation, does not, in itself, cause such a comment to be related to sexual orientation.
69. The Tribunal did give particular consideration to whether the first two comments in the ET1 Form of Claim, which were referring to a supposed scenario in which there was sexual activity by the Claimant with someone male and someone female could be said to be related to sexual orientation. The Tribunal ultimately concluded that the comments related to sex (in the sense of the sexual act) rather than sexual orientation. Moreover, the focus of the offensive content of these two comments was on the suggestion that the Claimant was someone who might engage in incestuous sexual activity.
70. The Tribunal notes that the first of these comments is alleged to have been said by Jon Gill in October 2019, in so far as that is the date under which it appears in the Claimant's chronology. No information is provided there as to the context or the circumstances in which that comment was made, other than that it was said in front of others and Jon Gill later said that he was only joking.





71. The Tribunal notes the second of the comments is alleged to have been said by Jon Gill in June 2019, where the Chronology also refers to other comments of a similar nature, but no context is provided other than the suggestion that Jon Gill “*loved to shock and be the centre of attention*”.
72. Ultimately, the Tribunal concluded that there was no feature to these comments, in the context of the factual matrix found by the Tribunal, which could properly lead the Tribunal to the conclusion that the conduct in question was related to the particular characteristic in question, and in the manner alleged by the Claim. In the language of the guidance referred to above, the Tribunal was unable to articulate, distinctly and with sufficient clarity, the feature or features of these comments, which would lead to the conclusion that the conduct was related to the protected characteristic of sexual orientation.
73. Viewed on their own, if, contrary to the conclusion set out above, the first two comments were related to sexual orientation, then the Tribunal notes that any cause of action in relation to these specific comments would have been out of time by, at the latest, the end of 2019. The fact that there were later offensive comments, which were not related to sexual orientation (as the Tribunal has effectively found), would be unlikely to assist the Claimant in establishing that the comments dating from July and October 2019 were part of an act extending over a period, which continued until a point in time which was within three months of the Claimant notifying ACAS so that any complaint would be in time.
74. For the sake of completeness, the Tribunal would not have found that these two comments, apparently from July and October 2019, on their own, were part of an extended act which extended beyond October 2019. As such, any complaints regarding these comments would be out of time. The Tribunal would not exercise its discretion to extend time on the basis that it would not have been just and equitable to do so. It was a year later before the Claimant contacted ACAS. He deliberately seems to have held back from raising issues regarding Jon Gill’s conduct for tactical reasons. The delay was serious and affected the cogency of the evidence, as demonstrated by the Claimant’s own difficulties in putting together a Chronology or Statement and Jon Gill’s difficulties in recollecting the specific comments alleged.
75. It follows that, ultimately, the Claim fails because the comments alleged to amount to harassment did not relate to sexual orientation.
76. *Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? If not, did it have that effect? The Tribunal will take into account the Claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

In the light of the conclusion set out above, this question becomes academic.



77. The Tribunal did have sympathy for the Respondent's argument that it was difficult for the Claimant to contend that the comments in issue had such a purpose or effect when he was a leading light in a toxic culture in which he was largely an enthusiastic participant. However, although it has been suggested that the comments were intended as banter or jokes, the Tribunal is also satisfied that the purpose of such comments was to shock and offend and, had any consideration being given to the position, it would have been appreciated that the effect was to create an intimidating, hostile, degrading, humiliating or offensive environment for employees such as the Claimant, even if, they themselves, were also guilty of creating such an environment. Ultimately, it seemed to the Tribunal that this last factor, namely the Claimant's own culpability and frequently willing participation in such a culture, was probably a factor which would have been more relevant to the issue of remedy, had it arisen.

78. It follows that the complaints are dismissed.

**Employment Judge Kenward**

10 October 2023