



# EMPLOYMENT TRIBUNALS

**Claimant** Ms J Talbot

**Respondent** Par Market Ltd

**Heard at:** Exeter  
(remotely)

**On:** 16 and 17 October 2023

**Before:**  
**Employment Judge** Goraj  
**Members** Mr J Ruddick  
Mr D Stewart

## **Representation**

**The claimant:** in person

**The respondent:** Mrs C Brooke- Ward, Counsel

## **RESERVED JUDGMENT**

### **THE UNANIMOUS JUDGMENT OF THE TRIBUNAL IS that: -**

The claimant's complaints of direct sex discrimination and harassment related to sex pursuant to sections 13, 26 and 39 of the Equality Act 2010 are dismissed.

## **REASONS**

### **BACKGROUND**

**The pleadings and associated documents**

1. The claimant, who was employed by the respondent between 1 and 22 June 2022 as a cleaning operative, commenced proceedings against the respondent by a claim form which was originally presented on 5 August 2022. The claimant's claim form is at pages 4-15 of the bundle.
2. The claimant's ACAS Early Conciliation Certificate is at page 3 of the bundle. The Certificate records that the claimant's EC notification was received on 27 June 2022 and that the certificate was issued on 28 July 2022.
3. The nature of the claimant's claims was not clear from the claimant's claim form and the Tribunal therefore wrote to the claimant on 7 September 2022 requiring her to confirm the nature of her claims prior to the acceptance and service of her claim form (page 16 of the bundle). The claimant replied to the Tribunals on 8 September 2022 (also page 16 of the bundle). The claimant contended, in summary, that she had been treated unfavourably because of her age and sex as one of her colleagues, whom she described as Antony ( Mr Trethewey) had taken offence at the fact that as a mature woman she did her job properly and in response deliberately splattered/ soiled the toilets which she was required to clean with runny excrement on more than seven occasions so that she had no choice but to stop working at the respondent. The claimant also complained about the respondent's failure to investigate the matter including to provide the relevant CCTV footage.
4. The claim form was subsequently accepted and served on the respondent who served a response denying the allegations. The respondent's response and attached grounds of resistance are at pages 24 – 33 of the bundle. The respondent also applied for the claims to be struck out/ subject to a deposit order on the grounds that they had no or little reasonable prospects of success.

**The case management hearing on 20 January 2023**

5. The matter was the subject of a case management preliminary hearing on 20 January 2023. The associated case management Order also dated 20 January 2023 is at pages 36- 39 of the bundle ("the CMO dated 20 January 2023"). It is recorded in the CMO dated 20 January 2023 that the claimant contended that she had been discriminated against because of her sex and/or age and that the less favourable treatment relied upon was the deliberate soiling of the toilets on the respondent's premises by another cleaner, Anthony (Mr Trethewey). It is further recorded in the CMO dated 20 January 2023 that the claimant was not able to set out categorically why she believed that she had received this treatment and therefore concluded that it must be because she was a mature woman (page 48 of the bundle). The

respondent renewed its application for a strike out/ deposit order at the hearing on 20 January 2023 and the matter was listed for a further preliminary hearing to determine the respondent's application.

**The Preliminary Hearing on 14 March 2023 and deposit order**

6. At a subsequent preliminary hearing on 14 March 2023, the claimant's complaint of age discrimination was struck out as having no reasonable prospect of success. The Tribunal refused the respondent's application to strike out the claimant's complaint of sex discrimination but ordered the claimant to pay a deposit of £250 as a condition of permitting the claimant to proceed with her claim. The Judgment of the Tribunal and associated deposit order (both dated 17 March 2023) are at pages 42 – 44 of the bundle. It is recorded at paragraph 5 of the deposit order dated 17 March 2023 that there was a dispute of fact as to whether the toilets were deliberately soiled which would need to be determined at a final hearing and, that if the toilets were found to have been deliberately soiled, to determine whether this was because of the claimant's sex. It was further recorded at paragraph 7 of the deposit order that the claimant was not able to explain to the Tribunal why she believed that the reason that her fellow employee picked up on her was related to her sex rather than for another reason such as a wider dislike or because she was a better cleaner (page 44 of the bundle).

**The case management hearing on 18 August 2023**

7. The claimant duly paid the deposit, and the matter was the subject of a further case management hearing on 18 August 2023 ("the CMO dated 18 August 2023") which is at pages 64 – 71 of the bundle. The issues which the Tribunal was required to determine are identified at paragraph 10 and paragraphs 1 – 3 of the List of Issues (direct sex discrimination/ harassment related to sex – the alleged constructive dismissal being an alleged act of direct sex discrimination) (pages 64-69 of the bundle).
8. The claimant was ordered by the CMO dated 18 August 2023 to provide further and better particular of each and every occasion upon which she found the toilets at the respondent smeared/ covered in faeces including the relevant dates and the alleged perpetrator. In response the claimant served her witness statement and attachments which are at pages 48 – 62 of the bundle. The claimant failed however to confirm many of the relevant dates as discussed further below.

**The hearing on 16 October 2023**

9. The hearing was conducted remotely by video conferencing ( CVP) at the request/ with the agreement of the parties. The claimant

had some issues with connectivity however these were addressed, and the claimant was able to participate appropriately in the hearing.

### **Witness statements**

10. The Tribunal received witness statements/ heard oral evidence as identified as follows:-

10.1 On behalf of the claimant – the claimant, Kelly – Jayne Barker (the claimant’s daughter) and a representative from Seetec Limited. The latter 2 witnesses were not in attendance at the hearing. The Tribunal did not, in any event, have regard to their evidence at this stage as their evidence related to remedy and the Tribunal confined itself first to the issue of liability.

10.2 The respondent – Mr A Trethewey (cleaning operative), Mr D Rawlings, Maintenance Manager, and Mr J Snowball, Market Manager – the Tribunal received witness statements and heard oral evidence from these witnesses.

### **Bundle of documents**

11. The Tribunal was provided with an agreed bundle of documents (“the bundle”) for use at the hearing.

### **The Issues and associated matters**

12. The claimant confirmed that she contends that she was treated less favourably than a man/ subject to harassment related to her sex. In essence, the claimant’s case is that Mr A Trethewey took excrement into the respondent’s toilets/ deliberately spread excrement in/soiled the toilets on the occasions identified below because she was a woman and would not retaliate / would not have done it if she was a man. The claimant further contends that she was constructively dismissed (and that such dismissal was tainted by sex) by reason of the above actions of Mr Trethewey and by Mr J Snowball’s refusal/ failure to investigate adequately when she advised him of the soiling matters. The claimant further contended that the alleged perpetrator in respect of the spreading of the excrement/ deliberate soiling was Mr Trethewey and that she does not contend that Mr Hunt was also involved. The claimant did not identify any alleged comparator.

### **Clarification of the alleged dates**

13. The dates of the alleged spreading of excrement/ deliberate soiling by Mr Trethewey were unclear from the claimant’s claim form/ witness

statement and the Tribunal sought to clarify the dates with the claimant at the commencement of the hearing. It emerged during subsequent discussions that the claimant had provided further details of the dates in an undated letter which the claimant believed, after consideration, had been prepared at the time of the ACAS process. It was agreed that the claimant would share this letter ( which is referred to below as the undated letter) with the respondent / the Tribunal in order to assist in the identification of the dates of the alleged acts by Mr Trethewey. The claimant's evidence regarding the relevant dates remained at times however confused including by way of example she initially indicated in her oral evidence that the meeting with Mr J Snowball regarding the reallocation of duties occurred on her day off on 14 June 2022 but subsequently indicated that it had taken place prior to the commencement of her working shift on 15 June 2022.

### **Other matters**

14. The claimant informed the Tribunal that she had dyslexia which may have caused her to have confused dates/ the identity of person on occasions. The Tribunal enquired whether the claimant required any adjustments to the hearing in respect of her dyslexia however the claimant indicated that no particular adjustments were required. The claimant was supported throughout the process by a friend (Hayley) with professional (accountancy) experience. The claimant was allowed adjournments by the Tribunal to allow her an opportunity to confirm the dates of the alleged acts of discrimination and to review her questions for cross examination (including to confer with Hayley).

### **FINDINGS OF FACT**

15. After giving careful consideration to the available evidence the Tribunal made the following facts which applied at the relevant times unless otherwise indicated below.

#### **The claimant**

16. The claimant was employed by the respondent as a cleaning operative from 1 June 2022 until 22 June 2022. The claimant's letter of appointment dated 1 June 2022, pursuant to which she was appointed on an initial probationary period of 3 months, is at pages 72- 73 of the bundle. The claimant worked for 5 days per week, from Wednesday to Sunday inclusive from 10am to 2pm. The claimant was employed as an additional cleaning operative and was required to assist with clearing / cleaning duties in the food hall and the checking/ cleaning of toilets.
17. The respondent operates an indoor market and food hall in Cornwall. The market operates on Wednesday, Saturday and Sunday and the

food hall is open on Wednesdays to Sunday inclusive. The market has approximately 70 traders and has a high volume of visitors.

**The respondent**

18. Mr J Snowball is employed by the respondent as the Market manager with responsibility for the day to day running of the site. At the relevant time, Mr Snowball was assisted by his son(Kristian), who has since left the business, and Mr D Rawlings who is employed as the respondent's maintenance manager. Immediately prior to the commencement of the claimant's employment there were three cleaning operatives namely Mr Ian Hunt, Mr A Trethewey and a female operative, Tara. They were longstanding employees who had a good working relationship including between the male and female operatives. The female operative was on leave at the relevant times.

**Mr Trethewey**

19. At all relevant times, Mr Trethewey worked at the market for four days per week namely, Tuesdays, Wednesdays, Saturdays and Sundays from 7am until 5.30pm. Mr Trethewey sometimes visits the market with his mother on his days off. Mr Trethewey is required, as part of his duties as a cleaning operative, to clean toilets and to make regular checks to make sure that they are clean. Mr Trethewey is a longstanding employee of the respondent who was highly regarded by Mr J Snowball who had not received any complaints regarding Mr Trethewey prior to the events in question.

**The toilets at the respondent**

20. There are two sets of toilets at the respondent market both of which are accessible to market users/ the public. There is one set at the side of the building by the market office ("the market office block") which consists of a disabled toilet, and a block of toilets for men and women containing cubicles. These toilets are open from 7am. The second set of toilets, which is in the middle of the market building just of the food hall ("the food hall block") consists of a disabled toilet, a baby changing cubicle and a block of toilets for men and women containing cubicles. Both sets of toilets receive a high level of use throughout the day. The cleaning operatives are required to inspect the toilets on a regular basis throughout the working day however there was no formal rota system/ written record of any toilet checks at the relevant times.

21. It is agreed that the claimant and Mr Trethewey had limited contact during the claimant's employment with the respondent and that they only spoke on a couple of occasions. The claimant did not contend in

evidence that she had raised any complaint regarding the cleaning arrangements directly with Mr Trethewey.

22. Shortly after the commencement of the claimant's employment with the respondent she received complimentary feedback from the respondent about the quality of her work which was shared with the female operative who was on leave.

### **The claimant's complaints**

23. During the course of her employment with the respondent the claimant raised a number of complaints with Mr J Snowball of the respondent regarding what she perceived to be cleanliness/ hygiene issues on site including in particular in respect of the state of the toilets / the alleged failure of the male operatives to clean them as required.
24. As explained previously above, It is the claimant's case that Mr Trethewey took excrement into/ deliberately spread excrement in the respondent's toilets on the dates identified below (which the claimant contends that he would not have done if she had been a man) and the Tribunal has therefore made findings of fact in respect of such alleged soiling accordingly.

### **Friday 3 June 2022**

25. The claimant contended in her witness statement (paragraph 6) / in her oral evidence that the first occasion on which she believed (with hindsight) that Mr Trethewey had deliberately spread excrement in the respondent's toilets was on Friday 3 June 2022 when she discovered an explosion of excrement in the toilet pan / running down the front and the side of the toilet bowl in the disabled toilet in the toilets in the food hall block. The claimant further stated in her witness statement that prior to the events of 19 June 2022 she had believed that the excrement had been deposited by a visitor who was unwell. This incident is referred to in the claimant's undated letter as occurring on Saturday 4 June 2022. The claimant stated in her oral evidence that she had discovered the excrement when she was undertaking her cleaning duties after lunch. Mr Trethewey denied the allegation. Mr Trethewey stated in evidence that he would never have done such a thing and further contended that he would not, in any event, have been at work on 3 June 2022 as he did not work on Fridays. In response to such evidence the claimant contended that Mr Trethewey had deliberately spread the excrement when visiting the market on his day off – which again was strongly denied by Mr Trethewey.
26. Having given the matter careful consideration, the Tribunal is satisfied, on the balance of probabilities, that the claimant discovered the alleged

excrement in the disabled toilets on either 3 or 4 June 2022. The Tribunal is not however satisfied, having weighed the available evidence, that Mr Trethewey was responsible for the spreading of excrement/ soiling of the toilet as alleged by the claimant. When reaching this conclusion, the Tribunal has taken into account in particular, that the claimant does not contend that she saw Mr Trethewey at the respondent/ in the toilet that day and also accepts that it was only with hindsight, in the light of the events on 19 June 2022, that she believed that Mr Trethewey was responsible. Further the allegation is denied by Mr Trethewey, who is a longstanding and highly regarded employee, who was not at work on 3 June 2022 as he did not work on Fridays. The Tribunal has further taken into account that the claimant had only commenced her employment with the respondent two days previously and that there was no evidence that she had had any dealings with Mr Trethewey at that time. The Tribunal is satisfied that the most likely explanation (which is what the claimant initially believed) is that the excrement had been deposited/ the toilet had been soiled by a customer particularly as the market had been open to the public for several hours by the time that the claimant cleaned the toilet in question.

#### **4/5 June and 8 June 2022**

27. It is the claimant's case that Mr Trethewey deliberately spread excrement/ soiled the toilets again on 4/5 June (Saturday/ Sunday) and 8 June 2022. The claimant contended in her witness statement (paragraph 8)/ in her oral evidence that when she went to clean the gents' toilets in the food hall block on Saturday 4 June 2022, she discovered excrement over the front of the toilet pan and on the floor. The claimant stated in her witness statement that she had discovered this at the beginning of her shift but contended in her oral evidence that that she had found it when undertaking her cleaning duties after lunch. The claimant stated in her undated letter that she had discovered diarrhoea in the gent's toilet in the food hall block on Sunday 5 June 2022 (not 4 June 2022). The claimant did not contend in her evidence that she had witnessed Mr Trethewey in the toilet on such dates.
28. The claimant further contended in her witness statement (paragraph 13 of the claimant's witness statement)/ undated letter and oral evidence that when she went to clean the baby changing unit in the food hall block after lunch on 8 July 2022 (which she corrected as 8 June 2022) that she discovered excrement for which she says that Mr Trethewey was again responsible. The claimant did not contend that she had witnessed Mr Trethewey in the toilet that day. The claimant further contended that following the discovery of excrement on 8 June 2022 she raised concerns regarding the state of the toilets with Mr Ian



Hunt including that she had worked in pubs, clubs, campsites and restaurants but had never encountered so many disgusting/ messy toilets to which he replied that it happened all the time in the toilets on the respondent's premises.

29. The allegations of the deliberate spreading of excrement/ soiling are again vigorously denied by Mr Trethewey. Again, having weighed the available evidence, the Tribunal is satisfied, on the balance of probabilities, that the claimant discovered the alleged excrement in the gents' toilets on 4/5 June 2022 and in the baby changing unit on 8 June 2022, which were days when Mr Trethewey would have been at work. The Tribunal is not however, satisfied that he was responsible for the alleged deliberate spreading of excrement /soiling of the toilets as there is no evidence of any involvement by Mr Trethewey on those dates. Further, the Tribunal is satisfied for the reasons previously explained above, that the most likely explanation for the soiled toilets is that they were left in such condition by a customer/ member of the public in accordance with Mr Hunt's explanation to the claimant on 8 June 2022/ the claimant's own assessment of the cause at the relevant time.

### **12 June 2022 and subsequent events**

30. On Sunday 12 June 2022, the claimant spent most of her time working alone whilst Mr Hunt and Mr Trethewey were engaged sorting out the bins. On their return Mr Trethewey asked the claimant whether she had cleaned the toilets and she replied that she had been too busy. The claimant then cleaned the toilets in the food hall block whilst Mr Hunt and Mr Trethewey cleaned the toilets in the market office block but quickly returned causing the claimant to question in her own mind whether they had cleaned the toilets properly.
31. The claimant continued to bring to the attention of Mr Snowball her concerns regarding the state of the premises including in respect of the toilets.

### **The meeting on 15 June 2022**

32. In response to claimant's concerns, Mr Snowball held a meeting to discuss the allocation of duties going forward. The claimant initially contended in evidence that the meeting had taken place on her day off on 14 June 2022 but subsequently accepted that the meeting was on 15 June 2022. There was a disagreement between the parties as to who was in attendance at the meeting. The parties are however in agreement that it was decided going forward that the claimant would focus on cleaning the offices and toilets in the market office block. Mr Snowball reallocated the duties in order to minimise the contact between the claimant and Messrs Hunt and Trethewey in respect of whom he believed that the claimant was unjustifiably critical as they

were longstanding employees who had not been the subject of any previous complaints. Following the meeting the claimant spent 3 hours cleaning the ladies' toilets in the market office block for which she received complimentary comments from stall holders and others.

33. The claimant contended in her witness statement that on two subsequent days (paragraphs 15 and 16 of the claimant's witness statement) she discovered further excrement spread over the toilets. The claimant says that on the first day she discovered runny diarrhoea splattered over one of the ladies' toilets in the market office block and on the second day a similar situation in the gents' toilet in that block. In the claimant's undated letter however, she only refers to one incident (in the gents market block toilets) on Wednesday 15 June 2022. The claimant accepted in cross examination that she could have swapped the events around in her mind. The claimant again contends that Mr Trethewey was responsible for the deliberate spreading of excrement/ soiling of the toilets. The claimant does not however contend that she witnessed any involvement by Mr Trethewey. Mr Trethewey again denies any deliberate soiling of the toilets/ involvement in the matter. Having weighed the available evidence the Tribunal is satisfied, on the balance of probabilities, that the claimant discovered excrement on one occasion, in the gents' toilet in the market office block on 15 June 2022. The Tribunal is not however satisfied, for the reasons previously explained in respect of the earlier incidents, that Mr Trethewey was responsible for the spreading of the excrement / soiling of the toilets.

#### **Saturday 18 June 2022**

34. At the start of her shift on Saturday 18 June 2022 (around 9.50am) the claimant headed toward the toilets in the market office block when she noticed the cleaning in progress cone outside the door and Mr Trethewey coming out of the toilets. The claimant asked Mr Trethewey whether he was cleaning the toilets that day and he replied no that he had just checked them and that they were fine. The claimant then went to fill her bucket and collect her cleaning kit in order to start her cleaning duties. When the claimant entered the ladies' toilet in the market office block approximately 10 minutes later she discovered that the first toilet was splattered with "sloopy poo" which was readily visible. The claimant was upset by what she had discovered and reported it to Mr K Snowball who inspected the mess. The claimant was fed up with what she then believed to be the lazy and dishonest attitude of Mr Hunt and Mr Trethewey towards their cleaning duties including that she kept finding a mess and was the only one who was cleaning it up. The claimant therefore informed the secretary that she was unable to work anymore that day, clocked off and went home.

35. Later that day Mr J Snowball contacted the claimant and asked her to come in for a chat at 5pm to which she agreed. On her way into the meeting the claimant passed the disabled toilets in the market office block and overheard a customer saying that she had been unable to use the disabled toilet as it was in a disgusting state with excrement everywhere. At the meeting on 18 June 2022 Mr J Snowball told the claimant that he did not wish to lose her and asked her to return to work to which she agreed.
36. It is the claimant's case, in the light of the subsequent events of 19 June 2022, that Mr Trethewey deliberately spread excrement/ soiled the toilets on 18 June 2022. This is denied by Mr Trethewey. Having weighed the available evidence the Tribunal is satisfied that when the claimant commenced her cleaning duties in the market office block she found a toilet in the ladies splattered with excrement notwithstanding that they had been inspected by Mr Trethewey approximately 10 minutes earlier. The Tribunal is not however satisfied, on the balance of probabilities, that Mr Trethewey had spread the excrement/ had deliberately soiled the toilets. When reaching this conclusion, the Tribunal has taken into account that not only is this denied by Mr Trethewey but also that the toilets had been open to the public since 7am (for approximately 3 hours at that time). Further the claimant did not witness anything on 18 June 2022 which led her to believe at that time that Mr Trethewey had deliberately soiled the toilet that day which she (again) then attributed to what she believed to be lazy behaviour on his part in not cleaning up the mess. The Tribunal is satisfied, on the balance of probabilities, that the most likely explanation for the excrement that day, including in the light of the subsequent events on 19 June 2022, is that the claimant's original assessment of the situation was correct, namely, that Mr Trethewey saw the excrement during his inspection but did nothing about it and did not tell the claimant the truth when he advised her that the toilets were "fine".

### **Sunday 19 June 2022**

37. At the start of her shift on the morning of Sunday 19 June 2022 the claimant checked the gents' toilet in the market office block which she found to be in a satisfactory state and therefore decided to clean the ladies' toilets first. Whilst cleaning the ladies' toilets the claimant left to fetch something from the store cupboard at which time, she witnessed Mr Trethewey leaving the gents' toilet. The claimant then inspected the gents' toilets and discovered runny excrement in one of the toilets. When she discovered the excrement in the toilet the claimant concluded that Mr Trethewey had taken excrement into/ was responsible for deliberately spreading excrement in the toilet. The claimant further concluded, on reviewing the matter with hindsight,

including what she perceived to be the similar runny nature of the excrement and the absence of any toilet paper, that Mr Trethewey had also deliberately spread excrement in the toilets on all of the previous occasions referred to above.

### **The review of the CCTV footage**

38. The claimant reported what had happened that day to Mr J Snowball, asked him to review the CCTV and then returned to continue with her job. The claimant was recalled to the office at which time she reviewed the CCTV footage with Messrs Snowball (J and K) and Mr Rawlings. They viewed the footage 4 – 6 times. The CCTV showed that Mr Trethewey was in the gents' toilet for 19 seconds and did not show anything in his hands. On the same day Mr J Snowball asked Mr Trethewey what he was doing in the gents' toilets to which he responded that he had gone into check the toilets. Mr Snowball decided to take no further action against Mr Trethewey as he considered that he had provided a satisfactory explanation as the CCTV had shown that Mr Trethewey was only in the toilets for a very brief period of time/ there was no sign of anything in his hands and further that he was a longstanding and well-regarded employee in respect of whom he had received no previous complaints. Mr Snowball stated in evidence that he did not dispute that the claimant had discovered excrement in the gents' toilet on the morning of 19 June 2022 and accepted that it was likely that Mr Trethewey had failed on that occasion to clean it up. The claimant contended that she believed that during the discussions regarding the CCTV footage, Mr J Snowball was about to say to Mr Rawlings that Mr Trethewey had a colostomy bag as a possible explanation for the excrement and then stopped himself. This is denied by Mr J Snowball/Mr Rawlings and Mr Trethewey further denied that he had/ has a colostomy bag. The Tribunal is not satisfied on the evidence that Mr Snowball was going to make such comment. When reaching this conclusion, the Tribunal has taken into account in particular that the claimant accepted that this was nothing more than an assumption on her part together with the denials of the respondent including regarding the use of a colostomy bag. Before returning to work the claimant asked Mr J Snowball to review the CCTV footage for previous occasions when she had found excrement/ soiling of the toilets.

### **The toilets on 19 June 2022**

39. Having given careful consideration to the available evidence the Tribunal is not satisfied, on the balance of probabilities, that Mr Trethewey took excrement into/that there was any spreading of

excrement/ deliberate soiling of the toilets by Mr Trethewey on Sunday 19 June 2022.

40. When reaching this conclusion, the Tribunal has taken into account in particular the agreed CCTV evidence including the very short period of time during which Mr Trethewey was in the toilet, that there was no evidence of anything in his hands together with his denial of any such actions. The Tribunal is satisfied, on the balance of probabilities, that the most likely explanation for the excrement is that in the light of the regular use of the toilets, a customer/ member of the public had used the toilets in the intervening period whilst the claimant had been cleaning the ladies' toilet and that Mr Trethewey had ignored it on his visit to the gents' toilets and left it for the claimant to clean up.

#### **The further events on 19 June 2022**

41. The claimant completed her shift on 19 June 2022. During her shift she cleaned the disabled toilet in the food hall which was covered in excrement which appeared to have been left uncleaned from the previous day notwithstanding that Messrs Hunt and Trethewey had both been on duty.
42. The claimant concluded her shift on the basis that she believed that the matter would be investigated by Mr Snowball who would review the previous CCTV. Mr Snowball decided however that it was not necessary to undertake any further investigation of the matter as having reviewed the CCTV footage of 19 June 2022 he was satisfied that there was no evidence that Mr Trethewey had taken excrement into / had deliberately spread excrement in/ soiled the toilets and he accepted the explanation from Mr Trethewey whom he considered to be longstanding and well regarded employee against whom he had received no previous complaints.
43. Over the following non-working days the claimant gave the matter further thought and became more and more convinced that Mr Trethewey had taken excrement into/ had been deliberately spreading excrement / soiling toilets for her to clean.

#### **The claimant's texts dated 22 June 2022 and 23 June 2022**

44. On 22 June 2022 the claimant sent a highly emotive text to Mr J Snowball (pages 75 – 76 of the bundle) in which in summary, she complained that she had always been coming across "shit filled toilets with no tissue" which she alleged had been thrown in by Mr Trethewey. The claimant said that she felt threatened and anxious and that she would not work "with those cunts" (which was a reference to Mr Trethewey and Mr Hunt) when Mr Snowball did not take it seriously.

The claimant also made an allegation “he” (which the Tribunal understands to be a further reference to Mr Trethewey) had done something to the disabled toilet in the food hall on the previous Saturday which she believed would be seen on CCTV. The claimant further stated that she would happily return to work when he (Mr Trethewey) was sacked. The claimant also stated that she would be returning her uniform and alleged that “Ian” had been in on it.

45. Mr Snowball responded by advising the claimant to drop her uniform in on Thursday but did not otherwise respond to her text. 22 June 2022 was the last day of the claimant’s employment with the respondent.

46. On 23 June 2022 the claimant texted Mr J Snowball advising him that she would be shortly dropping off her uniform (page 77 of the bundle). The claimant also requested to have sight of the CCTV footage for 9.45 until 10am on the previous Saturday morning and questioned what Mr Trethewey had been doing in the ladies’ toilet that day and whether he had checked the gents.

47. Mr Snowball did not grant the claimant’s request to view further CCTV footage as he did not consider that there were any grounds to investigate the matter further. Mr Snowball was satisfied in the light of his previous dealings with Mr Trethewey who was a longstanding employee against whom there had been no previous complaints, his knowledge of the operation of the market, including the open access to and heavy usage of the toilets by customers/ the public, together with the CCTV footage of 19 June 2022 that there was no evidence that Mr Trethewey had taken excrement into / deliberately soiled the toilets as alleged by the claimant/ any justification for any further investigation.

## **CLOSING SUBMISSIONS**

48. The Tribunal has had regard to the closing submissions of the parties which are summarised as appropriate below as part of the Tribunal’s conclusions.

## **THE LAW**

49. The Tribunal has had regard in particular to the following statutory provisions and associated provisions/ legal authorities: -

- (1) Sections 6, 13, 23 (1), 26, 39 (2) (c) & (d), 123, and 136 of the Equality Act 2010 (“the 2010 Act”).
- (2) The Equality and Human Rights Commission – Code of Practice on Employment (2011) (“the Code”) and in particular, the guidance contained in Chapter 3 (direct discrimination) and

Chapter 7 (harassment), and paragraphs 15.32 – 15.35 (burden of proof).

50. The Tribunal has reminded itself in particular of the following: -

**Direct discrimination**

- (3) Section 13 (1) of the 2010 Act states that :- 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.
- (4) It is for the claimant to establish, on the balance of probabilities, the factual basis of their claim including facts from which a Tribunal could conclude, in the absence of any other explanation, that the employer has acted in breach of the 2010 Act.
- (5) When determining whether an employer has treated an employee “less favourably” a comparison should be made with how they have treated other employees or would have treated other employees, in similar circumstances.
- (6) The Tribunal is required to consider whether the treatment is of such a kind that a reasonable employee would or might take the view that in all the circumstances it was to his/ her detriment. An unjustified sense of grievance cannot amount to a detriment.
- (7) The protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or main cause. It is sufficient if it is an effective cause.
- (8) In many cases it may be more appropriate for the Tribunal to establish the reason for the claimant’s treatment first. If the reason for the treatment is found to be because of a protected characteristic a comparison with the treatment of a hypothetical comparator can then be made.
- (9) For the purposes of the constructive dismissal element of the claimant’s direct sex discrimination claim the claimant has, in brief summary, to establish on the balance of probabilities, that the respondent, acted, without proper cause, in a way which was calculated or likely to destroy or seriously damage the trust and confidence between the parties, that any such repudiatory breach was tainted by sex discrimination and that the claimant terminated her contract of employment with the respondent in response to such breach without unreasonable delay.

**Harassment**

- (10) Harassment occurs where a person engages in unwanted conduct which is related to a protected characteristic, and which has the purpose or effect of :- (a) violating the employee's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee (section 26 of the 2010 Act).
- (11) Unwanted conduct includes unwelcome or uninvited behaviour and covers a wide range of conduct. Unwanted conduct amounts to harassment if it has the effect referred to at (10) above regardless of any intended purpose.
- (12) "Related to" also has a broad meaning and does not have to be because of the protected characteristic.
- (13) When determining whether the unwanted conduct had the effect referred to at (10) above, the Tribunal is required to have regard to the following :- (a) the perception of the employee – this is a subjective question namely, how did the employee regard the treatment (b) the other circumstances of the case including the personal circumstances of the employee such as his/ her mental health and (c) whether it is reasonable for the conduct to have had that effect – this is an objective test.

## **THE CONCLUSIONS OF THE TRIBUNAL**

### **The allegations of direct sex discrimination ( section 13 of the 2010 Act**

51. The Tribunal has considered first the allegations of direct sex discrimination namely, (1) the alleged deliberate soiling of the respondent's toilets by Mr Trethewey on the dates referred to above (paragraph 2.1.1 of the List of Issues contained in the CMO dated 18 August 2023) and (2) the alleged constructive dismissal of the claimant – the alleged breaches being the deliberate soiling of the toilets by Mr Trethewey and Mr J Snowball's refusal/ failure to investigate adequately when the claimant told him of the deliberate soiling (paragraphs 1 and 2.1 of the List of Issues contained in the CMO dated 18 August 2023).

#### **The alleged deliberate soiling of the toilets by Mr Trethewey**

52. The Tribunal has considered first the allegation that Mr Trethewey took excrement into/ deliberately spread excrement/ soiled the toilets in the respondent's premises on the dates identified above between 3 and 19 June 2022 and that he had done this because the claimant was a woman and would not retaliate (Issue 2.1.1 of the List of Issues in the CMO dated 18 August 2023)



53. The allegations are denied by the respondent. In brief summary, the respondent contends that the claimant has not provided any evidence to support the factual basis of her claim / any evidence that she was untreated unfavourably by Mr Trethewey because of her sex. The allegations are denied by the respondent who says that the alleged soiling by Mr Trethewey was not witnessed at any time by the claimant or anybody else and further that the claimant's evidence regarding the alleged events in question was confused/ inconsistent and unreliable including with regard to the alleged dates and times of the alleged conduct/associated events. The respondent refers by way of examples to the claimant's contention that the alleged spreading of excrement occurred on days when Mr Trethewey was not at work ( Friday 3 June 2022) and that when she realised that this was the case alleged instead that Mr Trethewey had come into work on his day off deliberately to soil the toilets and further that the claimant initially gave evidence that the meeting with Mr Snowball occurred on her day off on 14 June 2022 and then changed her evidence to the 15 June 2022.
54. In summary, the claimant continued to contend that Mr Trethewey deliberately spread the excrement/ soiled the toilets and that she had appreciated with hindsight in the light of the events on 19 June 2022 that Mr Trethewey had been doing this since 3 June 2022.
55. Having given the matter careful consideration, the Tribunal is not satisfied that the claimant has established the factual basis of her case namely, that Mr Trethewey took excrement into /deliberately spread excrement/ soiled the respondent's toilet on any of the alleged dates between (and including) 3 to 19 June 2022 including by way of any retaliation towards the claimant.
56. When reaching such conclusion, the Tribunal has had regard in particular to its findings of fact at paragraphs 26, 29, 33, 36, 39 and 40 above including that the most that has been established by the claimant on the facts is that on two occasions (18 and 19 June 2022) Mr Trethewey witnessed excrement in the toilets but did not clean it up/ told the claimant (on 18 June 2022) that the toilets were "fine" when this was not the case. This does not however form the basis of the claimant's case as the unfavourable treatment relied upon her for the purposes of this claim is the alleged bringing into /deliberate spreading of excrement/ soiling of toilets by Mr Trethewey.
57. Further for the avoidance of doubt, the claimant has not established on the facts any evidence from which the Tribunal could conclude that Mr Trethewey treated the claimant less favourably than he treated /would have treated a man in similar circumstances in respect of the soiled toilets including in respect of his actions on 18 and 19 June 2022. When reaching this conclusion, the Tribunal has had regard to the findings of fact referred to at paragraph 56 above and further that it was the claimant's own (original) assessment of the situation that the excrement which she discovered was because of what she perceived

to be the lazy/ dishonest attitude of Mr Trethewey/ Mr Hunt towards cleaning rather than any retaliation by Mr Trethewey because of her sex.

58. This allegation is therefore dismissed.

### **Was the claimant constructively dismissed**

59. The Tribunal has therefore gone to consider the second allegation of direct sex discrimination namely, whether the claimant was constructively dismissed by the respondent (paragraph 2.1.2 of the List of Issues in the CMO dated 18 August 2022). The alleged repudiatory breaches upon which the respondent relies for such purposes are :- (1) the deliberate soiling of the toilets by Mr Trethewey and (2) Mr J Snowball's refusal/ failure to investigate adequately when the claimant told him of the soiling matters (paragraph 1.1 of the List of Issues in the CMO dated 18 August 2022).

60. The Tribunal has dismissed above the claimant's allegations relating to the deliberately soiling of the toilets by Mr Trethewey. The Tribunal has however gone on to consider the second allegation relating to Mr J Snowball's alleged failure adequately to investigate the matter and in particular whether, viewed objectively, this constituted a repudiatory breach (of the implied term of trust and confidence) on the part of the respondent which was tainted by sex discrimination.

61. In summary, the claimant contends that Mr J Snowball failed adequately to investigate the matter including to allow her access to the CCTV footage which she believes would have supported her case.

62. In summary, the respondent denies that there was any repudiatory breach of contract on the part of the respondent in respect of the investigation of the matter / that the claimant was, in any event, treated less favourably because of her sex in respect of such investigation. The respondent says that the respondent carried out a reasonable investigation in all the circumstances including that it reviewed the CCTV footage of the 19 June 2022 which did not support the claimant's case of deliberate soiling by Mr Trethewey.

63. Having given the matter careful consideration, the Tribunal is satisfied that the claimant has established on the facts that whilst she was permitted to view the CCTV footage for 19 June 2022, Mr J Snowball did not permit her to view the requested CCTV footage for 18 June 2022 or for any earlier date.

64. The Tribunal is not however satisfied on the facts that, viewed objectively, Mr Snowball's refusal to permit the claimant to review any further CCTV footage/ failure to investigate the matter further constituted a repudiatory breach of contract entitling the claimant to terminate her employment.

65. When reaching this conclusion the Tribunal has taken into account in particular, that Mr Snowball did permit the claimant to review the CCTV footage for 19 June 2022 which did not support the claimant's contentions including in the light of the very short period of time (19 seconds) during which Mr Trethewey was in the gents' toilet and that there was nothing in his hands to indicate that he had taken excrement into the toilet/ deliberately spread excrement/ soiled the toilets as alleged by the claimant (paragraph 47 above). The Tribunal is further satisfied, having regard also to the further matters identified at paragraph 47 above, including Mr Snowball's knowledge of the heavy usage of the toilets in the respondent's market and his previous dealings with Mr Trethewey, who was a long standing and well-regarded employee, that he had reasonable and proper cause for accepting his explanation and for not investigating the matter further.
66. The Tribunal is also satisfied in the light of its findings regarding the reasons for Mr J Snowball's decision not to investigate the matter further, including to permit the claimant to view further CCTV footage, as set out at paragraph 47 above, that the claimant has failed to establish any evidence from which the Tribunal could, in any event, conclude that she has been treated less favourably than a man would have been treated in similar circumstances.
67. This allegation is therefore also dismissed.

**The complaint of harassment ( section 26 of the 2010 Act)**

68. Finally, the Tribunal has considered the claimant's complaint of harassment in respect of Mr Trethewey's alleged deliberate soiling of the toilets with faeces during the course of the claimant's employment (Issue 3 of the List of Issue in the CMO dated 18 August 2023).
69. The Tribunal is satisfied that if the claimant had been able to establish that Mr Trethewey had deliberately soiled the toilets as alleged ( and if there had also been evidence that it was related to the claimant's sex) it could have constituted harassment for the purposes of section 26 of the 2010 Act. The claimant has however, for the reasons previously explained above, failed to establish on the facts such alleged conduct by Mr Trethewey and this allegation is therefore also dismissed.

Employment Judge Goraj  
Date: 3 November 2023

Judgment sent to the Parties: 24 November 2023

FOR THE OFFICE OF THE TRIBUNALS

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